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2-7-44.

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THE EAST INDIES.

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CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

The East Indies.

BANK OF BOMBAY	DEFENDANTS ;	J. C.*
	AND	1912
NANDLAL THACKERSEYDASS	PLAINTIFF.	May 17, 20, 21; Oct. 31.
ON APPEAL FROM THE HIGH COURT AT BOMBAY.		

Indian Contract Act, 1872, ss. 166, 178—Pledgee of Goods without Notice of Plaintiff's Title—Delivery to the Order of Depositor not a Conversion.

Whatever may be the true construction of s. 178 of the Indian Contract Act, 1872, it is a complete defence to a suit for the delivery of the plaintiff's goods if the defendant has in good faith returned them to the order of the person by whom they were deposited without notice of the plaintiff's title. (1) Here the bank was not bound to suspect dishonesty in a pledger of good credit and reputation merely because being a muqaddam as well as a merchant he had an opportunity of acting dishonestly.

APPEAL from a decree of the High Court (January 20, 1910) reversing a decree of Beaman J. (March 8, 1909).

The action was brought on November 19, 1904, by the respondent against the appellant bank and one Lakhmidas Naronji, who did not defend, to recover 399 bales of cotton or Rs. 34,225 the value thereof. The respondent alleged (in substance) that he entrusted the said 399 bales to the second defendant to be held

* *Present* : LORD MACNAGHTEN, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

(1) The section of the Act really applicable was therefore s. 166.

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by him as muqaddam, i.e., warehouseman; that the defendant purported to pledge them to the bank, but that he was not in possession of the said bales, having merely the custody of them on the respondent's behalf; and that the bank did not act in good faith, and took the goods under circumstances which were such as to raise a reasonable presumption that the second defendant was acting improperly in making such a pledge.

The respondent also claimed that the bank was fully secured in respect of all moneys owing to them by the second defendant by pledges of cotton which the second defendant had validly and properly made to them, and that the bank was bound to resort first of all to such properly pledged cotton to make good the moneys owing to them by the second defendant, and in any event the plaintiff claimed to stand in the shoes of the second defendant and to enforce against the bank the rights which the second defendant would have had against the bank.

The case for the appellants was that as respects the cotton which came into their possession they were protected by a valid pledge thereof, and they denied that they were otherwise sufficiently secured.

The points raised in the appeal were :

(a) Was the bank protected from liability by s. 178 of the Indian Contract Act, 1872 ?

(b) Was the bank protected from liability by reason of the fact that before the goods were demanded from them by the respondent they had parted with the possession of them to the person from whom they received them, i.e., the second defendant, and without any notice of the respondent's alleged title ?

Sect. 178 of the Indian Contract Act, 1872 (Act IX. of 1872), is as follows :—

“ A person who is in possession of any goods, or of any bill of lading, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate, or warrant or order for delivery, or any other document of title to goods, may make a valid pledge of such goods or document : Provided that the pawnee acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the pawnor is acting improperly : Provided also that such goods or documents have not been

obtained from their lawful owner, or from any person in lawful custody of them, by means of an offence or fraud."

Beaman J. held that the second defendant Lakhmidas had possession of the goods within the meaning of s. 178; that the bank had acted in good faith, and did not receive the goods under circumstances which raised a presumption of improper dealing by the said defendant. He gave the respondent a decree against Lakhmidas for the full amount claimed, but dismissed it without costs against the bank.

The High Court in appeal decreed in the respondent's favour against the bank for the full amount claimed.

Basil Scott C. J. held that the pledge with the bank by defendant 2 was invalid under the second proviso to s. 178 of the Contract Act, inasmuch as he found that the 399 bales had been obtained by defendant 2 from the plaintiff (whom he held to have been their lawful owner) by means of an offence or fraud, he having obtained them on the pretence of holding them as a muqaddam but with the intention of pledging them with the bank.

Batchelor J. agreed with the above finding and also held (the Chief Justice concurring) (1.) that the respondent, if not the actual owner of the bales, had sufficient interest in him to entitle him to bring the suit; (2.) that all the 399 bales went into the bank's godowns; (3.) that defendant 2 being in custody of the bales as a mere warehouseman had not such possession as would under s. 178 enable him to make a valid pledge to the bank; (4.) that in any event the pledge was invalid under the first proviso to the section, inasmuch as the knowledge of the bank's servant Chunilal as to the position and dealings of defendant 2 ought to be imputed to the bank, and that they were therefore put upon inquiry as to his right to pledge the bales; and (5.) that the bank had been guilty of conversion, the return of the bales to defendant 2 (the evidence of which the learned judge held to be both admissible and conclusive) being under the circumstances of the case no answer to the plaintiff's claim.

The material passage in the judgment of the Chief Justice is as follows: "The line of defence which was ultimately adopted on behalf of the bank was based upon the discovery at a late

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stage of entries in the books of Lakhmidas which indicated that the goods in question had been sold in or about June, 1903, by Lakhmidas and that delivery of them had been given from the bank's godowns. It was argued that these sales were prior in date to any formal demand by the plaintiff and that on the authority of certain obiter dictum of Bigham J. in *Union Credit Bank, Ltd. v. Mersey Docks and Harbour Board* (1) it should be held that the bank were not guilty of any conversion. It appears to me that the defendants cannot succeed in this contention. Lord Chelmsford in *Hollins v. Fowler* (2) said: 'Any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion.' The return of the goods relied upon by the bank is a delivery to Lakhmidas' vendees, not a return of the bales to be held by Lakhmidas as plaintiff's muqaddam free of any lien of the bank. The bank by the unauthorized and fraudulent act of their godown keeper Ardeshir which in the stress of argument is now adopted and ratified gave delivery to the plaintiff's vendees and would thereupon be guilty of conversion even if they had not exercised dominion over the goods for a few months previously as security for advances to Lakhmidas."

Sir A. Cripps, K.C., H. A. McCardie, and H. St. J. Field, for the appellants, contended that the goods in action had been validly pledged to the bank under s. 178 of the Indian Contract Act, 1872, and that the section had been wrongly construed by the High Court. But independently of that section on the evidence the bank had not been guilty of any conversion and had not committed any actionable wrong against the respondent. It had no knowledge actual or constructive of the respondent's title to the goods. It received them in good faith from the second defendant and restored them to him or his order without knowing and without any reasonable grounds for suspecting that he was acting dishonestly. The proviso (1.) of s. 178 did not apply, for there was no evidence of even constructive notice that

(1) [1899] 2 Q. B. 205.

(2) (1874) L. R. 7 H. L. 757, at p. 795.

the second defendant was not the owner of the goods or that he was a muqaddam as well as a merchant or had any unusual facilities for dealing with the goods of others, and there was evidence of long and continuous dealing with the bank as a merchant of credit and respectability. They referred to *Union Credit Bank v. Mersey Docks and Harbour Board* (1); *Hollins v. Fowler* (2); *Spackman v. Foster* (3), cited with approval in *Miller v. Dell* (4); *National Mercantile Bank v. Rymill*. (5) The respondent claimed in the alternative to compel the bank to marshal its securities by resorting first of all to those goods which the second defendant had validly pledged as being his own property. But it was proved by the evidence that the goods had been delivered up to the second defendant before they were demanded by the respondent, who, moreover, had shewn no ground for claiming such a general account of all dealings between the bank and the second defendant as would be necessary in order to marshal the securities in the manner suggested. The appellant asked to be allowed to amend his defence by pleading that the cotton had been returned to the second defendant or his order. This was refused, but the Court allowed evidence of that return to be given in answer to the alternative case, and it was submitted rightly, and that the evidence when admitted was admitted for all purposes. As to the right to the amendment see *Anderson v. Smith*. (6)

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Atkin, K.C., and *Lowndes*, for the respondent, contended that he was shewn on the evidence to be the owner of the goods in action, and that they had been wrongfully pledged to the bank by the second defendant, in whose possession they were in his capacity of muqaddam or warehouseman. Both Courts had held that the respondent had sufficient interest in them to entitle him to sue. The bank received them under circumstances which raised a reasonable presumption that the second defendant was dealing improperly with them. It knew or must be taken to have known that the second defendant was doing business as a muqaddam and would necessarily have in his possession a large number of bales which he would have no right to pledge, and was accordingly

(1) [1899] 2 Q. B. 205, 214.

(2) L. R. 7 H. L. 757.

(3) (1883) 11 Q. B. D. 99, 101.

(4) [1891] 1 Q. B. 468, 473.

(5) (1881) 44 L. T. 767.

(6) (1860) 29 L. J. (Ex.) 460.

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put upon inquiries which in fact were not made. The bank therefore had no defence under s. 178 of the Contract Act and had been guilty of conversion of the goods. Evidence had been allowed to be given that the bank had returned the goods to the second defendant, although the return had not been pleaded. The pledge was invalid, and there was evidence, which the Appellate Court believed, that the goods had been obtained from the respondent by fraud; a wrongful dealing with them which put an end to the bailment. They referred to *Hilbery v. Hatton* (1); Bullen and Leake, Nisi Prius, 6th ed., p. 344; *Hollins v. Fowler*. (2) The measure of damages in an action for conversion was the value of the goods: see *Mulliner v. Florence* (3); *Union Credit Bank v. Mersey Docks and Harbour Board* (4); *Cooper v. Willomatt* (5); *McCombie v. Davies* (6); and *Fine Art Society v. Union Bank of London*. (7) The evidence to the effect that the bank had in fact returned the goods to the order of the second defendant was wrongly admitted and was insufficient except as regards a small portion as to which there was no dispute. The amendment raising that defence was rightly rejected by the first Court: see *Chova Kara v. Isabin Khalifa*. (8) If the pledge to the bank were valid the respondent was entitled to stand in the stead of the second defendant and the bank was liable to account for all the goods entrusted to it. The respondent would be entitled to be paid out of any balance found to be due and if necessary to have the securities held by the bank from the second defendant marshalled in his favour so that he should have the benefit of goods validly pledged.

Sir A Cripps, K.C., in reply.

The judgment of their Lordships was delivered by

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LORD MACNAGHTEN. This is an appeal from an order and decree of the High Court of Bombay in its appellate jurisdiction reversing the order and decree of Beaman J., who tried the case originally. The trial judge dismissed the suit

(1) (1864) 2 H. & C. 822.

(2) L. R. 7 H. L. 757, 795.

(3) (1878) 3 Q. B. D. 484.

(4) [1899] 2 Q. B. 205.

(5) (1845) 1 C. B. 672.

(6) (1805) 6 East, 538.

(7) (1886) 17 Q. B. D. 705.

(8) (1875) 1 L. R. 1 Bomb. 209.

without costs as against the first defendants, the Bank of Bombay, who are the present appellants. The Court of Appeal, consisting of Scott C.J. and Batchelor J., made a decree in favour of the plaintiff, with costs.

The plaintiff, a merchant in Bombay, by his plaint, which was filed so far back as November, 1904, claimed delivery of 399 bales of cotton which had been entrusted to the second defendant Lakhmidas as muqaddam or warehouseman and, as the plaintiff alleged, improperly pledged by him to the bank. In the alternative the plaintiff claimed payment of the value of the bales in question, and in the event of it being held that he was not entitled to any such relief as aforesaid, then he asked that his rights should be ascertained and declared, suggesting that the securities deposited by Lakhmidas with the bank should be marshalled in his favour.

The case was not brought to a hearing until January, 1909. For this delay both parties seem to have been equally to blame. Various irrelevant issues were raised and various irrelevant defences were set up, and there were interlocutory applications protracted and all apparently futile. Both parties seem to have been in the dark as to the real facts of the case, which were not elucidated until the suit was at hearing, though apparently the plaintiff might have discovered the facts from Lakhmidas' books which were accessible to him, and the bank ought to have been able to produce an accurate record of their dealings with their customers.

There were twenty-one issues originally settled. In the course of the hearing an additional issue was proposed by the learned counsel for the bank, and allowed without opposition on the part of the plaintiff. It was in the following terms: "Whether the bank has been guilty of any conversion in respect of the goods in suit?" Upon that issue the case ultimately turned.

The material facts as ascertained during the trial may be stated shortly.

Lakhmidas, though now insolvent and under sentence of imprisonment for criminal breach of trust, was in good credit in the early part of 1903 and then carrying on business in Bombay both as a cotton merchant on an extensive scale and also as a

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muqaddam or warehouseman. He was financed by the bank, and in the habit of pledging cotton with the bank to secure his account for cash advances and cash credits, and in the habit of withdrawing parcels of cotton so pledged when and as he disposed of them in the course of his business, leaving of course an amount sufficient to cover his liability to the bank or else substituting other cotton for the cotton so withdrawn.

At that time the managers of the bank had no reason to suppose that Lakhmidas was carrying on any business but that of a cotton merchant. They were assured that he had given up the business of a muqaddam, which at one time was carried on by his firm, though undoubtedly a man in their employ, whose duty it was to obtain information for the bank with regard to their customers, was aware that Lakhmidas was carrying on the business of a warehouseman as well as that of a cotton merchant. This man seems to have been in partnership with Lakhmidas or in collusion with him.

In February, 1903, the plaintiff as purchaser of the bales in question in this suit, or in some other manner interested therein, took delivery of them and entrusted them to Lakhmidas as warehouseman. Lakhmidas immediately pledged them with the bank. For a time they were deposited in the open air jetha at Colaba, which is said to have been leased by him in the name and on behalf of the bank.

About the end of April or early in May, 1903, on the approach of the monsoon, all the cotton in the possession of Lakhmidas at Colaba was removed by him into godowns leased by the bank and placed there in the bank's custody.

In June and July, 1903, all the bales of cotton in suit, with the exception of two (as to which there is no question now), having been sold by Lakhmidas were withdrawn from the bank's godowns and passed out to Lakhmidas or to his order.

No claim to this cotton was made by the plaintiff against the bank before it passed out of the hands of the bank. The bank had no notice or reason to suspect that it belonged to any one but Lakhmidas, or that any one but Lakhmidas had any right or title thereto or any interest therein.

The fact that the cotton was returned to Lakhmidas, or parted

with to his order, was established during the cross-examination of Lakhmidas, called as a witness by the plaintiff, and proved by inspection of his books.

The plaintiff strongly objected to any evidence being given as to this fact inasmuch as it had not been pleaded by the bank as a defence to the suit. But the learned judge held, and in the opinion of their Lordships held rightly, that the fact could not be excluded having regard to the claim to marshal securities set up by the plaintiff.

If the evidence on this head was properly admitted it seems to their Lordships that it must be admissible for all purposes.

Their Lordships think that the fact that the bank parted with the cotton deposited with them to or to the order of the person by whom it was deposited without notice of any claim by any other person affords a complete defence to the suit.

Their Lordships agree in the finding of the learned trial judge that the bank acted throughout in good faith—a finding which does not seem to have been questioned on the appeal to the High Court. Nor indeed do they think that there would have been any imputation on the conduct of the bank if the managers of the bank had known that Lakhmidas was a muqaddam as well as a cotton merchant, though of course for their own protection they would have been careful in dealing with him, if they dealt with him at all, had they known that he carried on both businesses. No one is bound to suspect dishonesty in a person of good credit and reputation with whom he is dealing merely because that person occupies a position which would enable him to act dishonestly if he were a rogue.

Taking the view which their Lordships do of this case, it is unnecessary for them to express any opinion on the construction of s. 178 of the Indian Contract Act, 1872.

Having regard to the loose manner in which the business of the bank was conducted, and the way in which the suit was defended, their Lordships are of opinion that the appellants are not entitled to any costs.

Their Lordships will therefore humbly advise His Majesty that the order appealed from should be discharged without costs,

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J. C. any costs already paid being repaid, and that the order of
1912 Beaman J. should be restored.

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There will be no costs of the appeal.

Solicitors for appellants : *Cameron, Kemm & Co.*

Solicitors for respondent : *T. L. Wilson & Co.*

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Nov. 1, 26.

BOMBAY FIRE AND MARINE INSUR- }
ANCE COMPANY, LIMITED } RESPONDENTS.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Policy of Fire Insurance—Damage done by Water—Damage increased during Possession by the Insurers—Liability of Insurers.

An insurance company taking and holding under a provision in its policy possession of premises damaged by fire does so in its own interest in order to minimize its loss, and cannot be allowed to say that the actual damage shewn at the date of giving up possession to the owner is not the consequence of the fire. Damage done by the water employed to extinguish the fire being within the loss insured, any increase to that damage while the property is under the care of the insurers must be borne by them.

APPEAL from a decree of the High Court (December 7, 1908) reversing an order of Davar J. (January 23, 1908) which had dismissed the respondents' petition.

By their petition, which was filed on December 7, 1907, under the circumstances stated in their Lordships' judgment, the nineteen companies which had granted policies of fire insurance to the appellant applied to the High Court under s. 5 of the Indian Arbitration Act, 1889, for leave to revoke the submission of the parties to arbitration as to the amount due thereunder in consequence of a recent fire, on the grounds that the arbitrators had wrongly decided to admit evidence which was irrelevant and

* *Present* : LORD MACNAGHTEN, LORD MOULTON, SIR JOHN EDGE, and MR. AMEER ALI.

inadmissible, and that it was not open to the appellant to claim in the arbitration damages for negligence by the companies : alternatively, they prayed (and this alternative was mainly pressed) the Court to direct the arbitrators that they had erred in law in their ruling and to intimate to the arbitrators the course which they ought to pursue. The said evidence related to the damage done by water to the machinery insured. It was contended on behalf of the appellant that the damage done to the machinery was due principally (if not entirely) to the wetting of the different parts by the water used to extinguish the fire, the insurance companies, though in possession of the salvage from October 16, 1906 (i.e., two days after the occurrence of the fire), having taken no adequate steps to dry or clean the parts affected. The evidence recorded by the arbitrators also went to shew that it was customary in Bombay for the insurance companies in such cases to clean the machinery, and that their agents had in this particular case done some cleaning, though (as it would appear) not sufficient to prevent the damage for which the appellant sought to hold them liable. Counsel for the companies admitted that the original wetting of the machinery was a cause of damage arising out of the fire, but he contended that rusting through not cleaning or for other reasons was not a result of the fire, the fire being only an indirect cause.

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The decision of the arbitrators was as follows: "Without in any way deciding the question as to whether or not any and if so what consequential damages could be awarded to the claimant under the contract of assurance, we hold that evidence of the nature offered to be produced on behalf of the claimants and objected to by Mr. Chamier on behalf of the companies, is allowable for the purposes of the subject-matter of this reference. We think that it is open to the claimant to contend that under the policy the companies did take possession and that they were bound to protect and clean the machinery."

Davar J. dismissed the petition, his principal reason being that so far the arbitrators had decided nothing, and that the evidence provisionally admitted might be good and relevant evidence on some question within the scope of their reference.

This order was reversed on the appeal of only one of the

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nineteen companies concerned, the High Court holding that the jurisdiction of the arbitrators extended only to the dispute relating to loss or damage from fire under the terms of the policy of insurance in each case, and not to the question of any loss or damage alleged to have arisen from the neglect of the insurance companies to take care of the machinery after the fire had been extinguished and the companies had entered into possession.

The material passage in the judgment of Chandavarkar J. is as follows : " In construing the agreement to refer to arbitration we ought to bear in mind one cardinal principle, namely, that by a submission to arbitration a party deprives himself of the right accorded to him by common law to have the dispute to which the submission relates decided by a Court of law. Therefore it must clearly appear from the terms of the submission that with reference to any point the party has so deprived himself. Here the dispute referred relates to damage or loss from fire, whereas the claim on which the arbitrators were asked to adjudicate and which they have held they have jurisdiction to decide in addition to the loss or damage from fire is the loss or damage consequent on the tortious conduct of the insurance companies after the fire had been extinguished. Mr. Inverarity has before us attempted to shew that what his client wants to do before the arbitrators is to prove that this latter loss is also and in substance loss from fire. But that was not the case made before the arbitrators, and I do not think that the loss alleged can be included in loss from fire on any reasonable view of the case, because the deterioration of machinery from neglect on the part of the insurance companies to take care of it is not an inevitable or direct consequence of the mischief by fire. It is only where mischief arises from fire in fire insurance cases, and from perils of the sea in maritime insurance, and the natural and almost inevitable consequence of that mischief is to create further mischievous results that underwriters become responsible for the further mischief so incurred. (See Pollock C.B. in *Montoya v. London Assurance Co.* (1)) "

Atkin, K.C., and *Lowndes*, for the appellant, contended that this ruling was erroneous. The arbitrators had not at the date

of the petition come to any decision upon the questions referred by which the respondent company was or could ultimately be materially prejudiced. They had merely admitted certain evidence relating to the damage suffered by the machinery. After the submission to arbitration the arbitrators alone had jurisdiction to determine whether the appellant was entitled to recover any damages, and, if so, what was the amount recoverable in respect of the particular damage alleged by him. That was within their province to decide, and the first Court was right in leaving the decision to them. The Appellate Court erred in deciding a point which was necessarily included in the reference. The arbitrators are not shewn to have erred in any way : see *Falkingham v. Victoria Railways Commissioner*. (1) As regards revoking the submission made and acted upon reference was made to Act IX. of 1899, ss. 5 and 10, and to the Court's exercise of discretion upon such a matter : see *S. S. Den of Airlie Co. v. Mitsui & Co.* (2) It did not appear in this case that any failure of justice would result from the course taken and proposed by the arbitrators. The amount of damage done by fire cannot be ascertained at the moment of extinguishing the fire. Whatever damage was done to the machinery was by the water employed, and if it was increased thereafter owing to any negligence on the part of any one it is sufficient proof of the respondents' liability that they took possession thereof under a clause in the policy, and it was entirely their own business to take all necessary steps to minimize their loss.

Sir A. Cripps, K.C., and *H. A. McCardie*, for the respondents, contended that the High Court had rightly exercised its discretion in the order made. The arbitrators had in fact exceeded their jurisdiction and enlarged the scope of the reference, and the High Court was right in directing them to that effect. All that the companies contended for was that the claim for consequential damage owing to alleged negligence after the fire and after the loss occasioned by the fire had occurred was not within the submission to arbitration, but any claim to that effect could be prosecuted by a separate action in the High Court. On the construction of the policies in question, the only question upon

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(1) [1900] A. C. 452, 464.

(2) (1912) 17 Commercial Cases, 116, 129.

J. C. which it was provided that arbitration should take place was the
 1912 amount of the appellant's loss or damage by fire, and it was con-
 ——— tended that on the letters and alterations in the draft submission,
 AHMEDBHOY all of which were in evidence before the arbitrators and the Courts
 HABIBBHOY below, the appellant had agreed not to raise in the arbitration the
 v. questions of consequential loss and damage which he nevertheless
 BOMBAY put forward. Deterioration of the machinery caused by the
 FIRE AND negligence alleged by the appellant could not be regarded as loss
 MARINE put forward. It was contended that the Court had rightly exercised
 INSURANCE its discretion and that its exercise thereof would not be interfered
 COMPANY, with in appeal.
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Atkin, K.C., in reply.

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The judgment of their Lordships was delivered by

LORD MOULTON. This appeal relates to certain arbitration proceedings instituted for the purpose of ascertaining the amount due to the appellant under fire policies taken out by him with the respondent company and eighteen other companies upon a cotton mill in Bombay known as Victory Mill.

The facts of the case are very simple and may be briefly stated as follows. A fire broke out in the Victory Mill on October 14, 1906, and did very extensive damage. Immediately after the fire the appellant gave notice of his claim to the insurance companies, and they took possession of the premises under powers reserved to them in that behalf and retained possession for a considerable period for salvage purposes, during which time they sold and realized certain salvaged property. Possession of the premises was ultimately given back to the appellant, who thereupon made out the amount of his claim under the policy. The companies disputed the amount of his claim, and, in accordance with the terms of the policies, the matter was referred in each case to arbitration, but as the policies were substantially in the same form a joint inquiry was held before the arbitrators, at which all the companies were represented by one counsel. Its object was to ascertain once for all the total amount of the loss from which the shares to be borne by the respective companies could immediately be deduced.

In these arbitration proceedings the present appellant tendered

evidence to prove that the machinery was seriously injured not only by the fire, but by the effect of the water that had been used to extinguish the fire. This evidence shewed that the injury to the machinery by the presence of the water was in its nature progressive, i.e., that it had been seriously increased by the length of time during which the water had been allowed to lie on the machinery. Counsel for the companies objected to the admission of this latter evidence. He admitted that damage done by the water employed to extinguish the fire came within the loss insured by the policy, but he raised the contention (to use his own words) "that the liability for damage to property ceased the moment the fire was extinguished."

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The question of the admission of this evidence was formally argued before the arbitrators and they decided that they would allow the evidence to be given. Thereupon the whole of the companies petitioned the High Court to revoke the submissions to arbitration on the ground that the arbitrators had exceeded their jurisdiction in admitting the evidence. The petition came on for hearing before Davar J. on January 11, 1908. The facts were not in dispute. In the argument on the hearing counsel for the insurance companies apparently treated the evidence that the injury to the machinery from the presence of the water had increased during the time that had elapsed between the fire and the delivery up of possession by the companies as being evidence that could relate solely to what was termed "a tortious act" on the part of the insurance companies, and they contended that no such question was referred to the arbitrators. On January 23, 1908, judgment was delivered. The learned judge made no order on the petition and directed the petitioners to pay the costs of the present appellant in the petition. The main ground of the judgment was that by admitting the evidence the arbitrators had decided nothing, and that there was no cause to interfere with their action.

From this decision the present respondent appealed to the High Court sitting in appeal from its original civil jurisdiction. The appeal was heard by Chandavarkar and Batchelor JJ., and on December 7, 1908, judgment was delivered allowing the appeal. The main ground of the judgment is expressed by Batchelor J.

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as follows: "For whereas this contract refers only to loss by fire, those damages would arise from a totally different origin, an origin which it seems to me is wholly distinct and separable from the fire, namely a neglect by the companies of some duty imposed on them after the loss by fire and water had become an accomplished fact."

The order made by the High Court was of a very unusual kind; the only operative part was that it set aside the order of Davar J. and directed the present appellant to pay the costs of the petition and appeal. This was accompanied by an expression of the view of the Court on the point of law involved to which more particular reference will be made later on. But no order was made revoking the submission, the Court evidently realizing that their expression of opinion would be accepted by the arbitrators as authoritative guidance in the matter and that there was no reason to fear their not acting in accordance with it in the future conduct of the arbitration.

From this order the present appeal is brought. It raises, therefore, the plain and simple issue whether the loss due to fire and water under such a policy is to be determined at the moment the fire is extinguished or when the companies give up possession of the premises to the owner after exercising the powers given to them by the policy for the purpose of enabling them to minimize the damage. It is, however, scarcely necessary that their Lordships should formally negative the contention of the companies in this respect, for it is so obviously unreasonable that the eminent counsel who appeared for them on the appeal did not attempt to support it. They confined their argument to contending that, although the insurance companies were undoubtedly liable for the damage done by the presence of the water subsequently to the fire during the time that the premises were in their possession, the judgment appealed from was correct in law because it did not pronounce to the contrary, but only decided that no claims based on breach of duty by the companies had been referred to the arbitrators. Their Lordships are of opinion that this does not rightly represent the effect of the judgment or of the order made thereon. The effective portion of that order is a declaration of the opinion of the Court in the following words:—

“ This Appellate Court is of the opinion that the jurisdiction of the said arbitrators extended only to the dispute relating to loss or damage from fire under the terms of the policy of insurance in each case and not to the question of any loss or damage alleged to have arisen from the neglect of the insurance companies who are parties to the above-mentioned arbitration to take care of the machinery of the respondent after the fire mentioned in the petition of the petitioners above named had been extinguished and the insurance companies had entered upon possession under clause 11 of the policy of insurance mentioned in the said petition.”

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Taken in connection with the contentions of the parties it is clear that the High Court intended by this expression of opinion to direct the arbitrators that the loss must be estimated from the condition of the machinery, &c., at the moment when the fire was extinguished. Had the present appellant permitted this order of the High Court to remain unappealed against, the arbitrators would have been bound to estimate the damages upon that erroneous footing.

The fundamental error in the contention of the present respondents seems to their Lordships to have arisen from a misapprehension of the position of an insurance company taking and holding possession of premises damaged by a fire under the provisions of the policy in that behalf. The provisions in virtue of which it does so are for the purpose of enabling it to minimize the damage. Inasmuch as it has to bear the loss there is no one so directly interested in doing everything that is wise for the purpose of making the best of the situation. It does so in its own interest, not because it is under a duty to the assured. Its powers are of the nature of a privilege to do that which is most for its own benefit under the circumstances so as to reduce the loss. In the present case, therefore, there is no question of tort on the part of the companies. They may have thought that it was not worth while to expend money in drying the machinery. In this view they may have been right or wrong, but they unquestionably had full power to take the course which in fact they did take. But when they have thus taken possession of the premises and done what in their opinion was wisest to minimize

J. C. the damage, they cannot say that the actual damage is not the
 1912 natural and direct consequence of the fire.

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Their Lordships are therefore of opinion that the High Court ought to have affirmed the order of Davar J. dismissing the petition, and they will therefore humbly advise His Majesty that the appeal be allowed and that the order of Davar J. be restored, and that the present respondents be directed to pay the costs of the appeal to the High Court and of this appeal.

There have been various irregularities in procedure in connection with the various stages of the petition. But it is not necessary to refer to them in this judgment because at the hearing of the appeal these irregularities were waived by the appellant on the terms assented to by the respondents, that the General Accident, Fire and Life Assurance Corporation, Limited, should be taken to be a respondent to the appeal so far as liability for costs is concerned.

Solicitors for appellant : *T. L. Wilson & Co.*

Solicitors for respondents : *Cameron, Kemm & Co.*

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J. C.* COURT OF WARDS FOR THE PROPERTY }
 1912 OF MAKHDUM HASSAN BAKHSH . . . } DEFENDANT;
 AND
 Oct. 31; ILAHI BAKHSH AND OTHERS PLAINTIFFS.
 Nov. 26.

ON APPEAL FROM THE CHIEF COURT OF THE PUNJAB.

*Punjab Land Revenue Act, 1887, s. 44—Effect of Entry in a Record of Rights—
 Land proved to be Waqf or Graveyard.*

Punjab Land Revenue Act, 1887 (Act XVII. of 1887), s. 44, enacts that "an entry made in a record of rights in accordance with the law for the time being in force shall be presumed to be true until the contrary is proved or a new entry is lawfully substituted therefor."

In a suit to restrain the appellant from selling as his private property certain land of which he was the nominal owner an entry in a record was to the effect that an area of which the land in suit formed

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**Present : LORD MACNAGHTEN, LORD MOULTON, SIR JOHN EDGE, and MR. AMEER ALI.*

part was graveyard which had been set apart for the Mussulman community, and that by user if not by dedication the whole area was waqf :—

Held, that the appellant's claim to deal with vacant portions of that area as his private property was not admissible.

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COURT OF
WARDS

v.

ILAH
BAKHS.

APPEAL from a decree of the Chief Court (December 16, 1907) reversing a decree of the District Judge of Multan (April 15, 1907).

The question decided was whether the appellant or his predecessors in title had created a valid and irrevocable waqf of the land in suit, dedicating it in perpetuity to the use of the Mahomedans in Multan as a cemetery.

The respondents sued as Mahomedan residents of Multan City having the right to bury their dead in the land in suit and for a declaration that it was graveyard in possession of the Mahomedan community, with consequential relief against the appellant, who had advertised portions of the land for sale as his own property. The appellant pleaded that the land was owned and possessed by him with full power of transfer, which he had frequently exercised by sales and leases, and that it was not waqf or graveyard.

The District Judge dismissed the suit, finding "that the defendant had never treated the land as waqf, that he had sold from time to time any clear spaces for building, had leased others and had realized miscellaneous income from the whole, and had asserted his rights as landlord by exacting a due of 3 pies per grave from those burying their dead with his permission," and that these transactions had not in the past been objected to by the Mahomedan community or the general public; that there had been no dedication of the area, nor had there been any declaration that the whole area now sued for was waqf.

The Chief Court in appeal declared that the land in suit was waqf in possession of the Mahomedan community as a graveyard, and granted the relief prayed on the ground that "although there is no direct proof of dedication as waqf we can safely conclude that long before 1858 it had become waqf at least by user"; and that in 1858 this status of waqf had been fully recognized, and that no acts of acquiescence in the appellant's wrongful alienations could affect the rights of the plaintiffs or the tenure of the land.

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De Gruyther, K.C., and *O'Gorman*, for the appellant, contended that the appellant and his predecessors had been shewn by the evidence to have been in proprietary possession for generations of the land of which the area in suit formed a part. The burden, therefore, of proving that the land in suit had been dedicated as waqf lay upon the respondents, who had failed to discharge it. At the first regular settlement it was recorded as being in the ownership of the appellant's predecessor. It was proved that in 1880 the Government acquired a portion of the appellant's land for a railway station and paid compensation to his predecessor; that his predecessor had granted leases and made sales of portions of land and granted licences to bury bodies on payment. In 1858 the residents of Multan, including the appellant's father, petitioned the Commissioners on sanitary grounds to restrict the right of interment to certain specified areas, but the proceedings left untouched the question of dedication by user or otherwise.

Arthur Grey, for the respondents, contended that the land in suit had been entered in the record of rights of the last settlement as in possession of the Mahomedan community and was described as "kabristan" or graveyard. The appellant was no doubt entered as owner in the ownership column, but that was in accordance with custom, he being admittedly the mutawalli or trustee thereof. He referred to the Punjab Land Revenue Act (XVII. of 1887), s. 44, and contended that entries made according to law in a record of rights raised a presumption of correctness which the appellant had failed to rebut. Even if no express dedication of the land could be proved the continuous use of the land for the purpose of burial shewed that it had become waqf by user. In 1858 its character as graveyard was recognized by the authorities, who on sanitary grounds ordered some portions of it to be closed and others to be used.

De Gruyther, K.C., in reply.

The judgment of their Lordships was delivered by

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LORD MACNAGHTEN. In the immediate neighbourhood of the city of Multan there is a large tract of unculturable or uncultivated land generally known as the Mai Pak Daman or the Pak Daman graveyard. From time immemorial it has been used by

the Mahomedan community in Multan for the purpose of burying their dead. But there is no evidence to shew when or how it was originally set apart for the purpose of a burial ground.

In the judgment of the Chief Court in this case there occurs the following passage giving, as their Lordships think, a very probable account of the origin and early history of this graveyard:—"Bahawal Hakh [sic], the famous saint, was born in the 12th century of the Christian Era. He had a son, Sadr-ud-din, whose wife was called Mai Pak Daman. She was revered as a saint and her body was buried in a shrine within the area in suit. No one can tell when the surrounding land was definitely set aside as wakf; but we can safely conjecture that, in the first instance, Musalmans began to bury their dead here and there in the waste land about her tomb, because of the desire to be buried near the body of a saint. There can be no doubt that for hundreds of years the land about her tomb has been used as a burial ground, and though there is no direct proof of dedication as wakf, we can safely conclude that long before 1858 it had become wakf at least by user."

The year 1858 referred to in the above passage is the date of a representative public meeting of Mahomedans called by the authorities for the purpose of considering the question of Mahomedan graveyards for the city. At that meeting a resolution was passed apparently in accordance with the suggestion of the Government to the effect that owners of khankahs or shrines should keep open graveyards in their own khankahs, that four old graveyards, of which Mai Pak Daman was one, should be kept open for the whole Mahomedan community, that three new graveyards should be provided, and that all other graveyards should be closed. The predecessor in title of the person for whom the Court of Wards is now acting took part in giving effect to this resolution.

The resolution was sanctioned by Government, and in 1867 a robkar was published giving notice that if any Mahomedan buried a corpse outside the authorized places it would be taken up and buried in one of those places.

In the record of rights of the last settlement an area of land which comprises the land in this suit is entered as "in the

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possession of the Mohammadans," and is described as kabristan or ghair-mumkin kabristan, that is "graveyard or unculturable land forming portion of a graveyard." In the ownership column Makhdum Hassan Bakhsh, now represented by the Court of Wards, is entered as "owner." It would seem that he was properly entered as owner, being trustee and custodian of the shrine of the saint Mai Pak Daman, and being or claiming to be the recognized head of the Mahomedan community in Multan.

In this state of things the appellant, the Court of Wards for the property of Makhdum Hassan Bakhsh, advertised for public sale a piece of ground lying within the area of the graveyard as described in the settlement papers.

Thereupon certain Mahomedan residents in Multan of different classes and various occupations combined together and brought this suit as co-plaintiffs, claiming an injunction to restrain the proposed sale, and also asking for a declaration that certain lands described in the settlement records as graveyard, and comprising an area considerably larger than that now in suit, was inalienable as waqf. It appeared in the course of the suit that on part of the land described as "graveyard" in the settlement papers there had been encroachments, that part had been acquired for public purposes, and that some lots had been, as it was alleged, sold by the Makhdum for his private purposes. So, in order to avoid all questions which might be raised with regard to land which had been so dealt with, the plaint was amended, and the area for which protection was claimed was limited to a piece of ground measuring 437 kanals and 4 marlas, or something between forty and fifty bighas.

The District Judge dismissed the suit with costs. On appeal the Chief Court granted the relief asked for by the plaintiffs, but without costs. From this order of the Chief Court the Court of Wards has appealed to His Majesty in Council.

The only substantial ground of appeal urged before the Board was that the area known as the Pak Daman graveyard was not one continuous burial ground, but merely an area of uncultivated ground in which here and there were to be found graves or clusters of graves, and the defence set up was that vacant ground

unoccupied by graves remained the private property of Makhdum Hassan Bakhsh, and that the Court of Wards was bound or entitled to deal with it for the benefit of his estate without regard to the claim advanced by or on behalf of the Mahomedan community in Multan.

The Punjab Land Revenue Act (Act XVII. of 1887), s. 44 enacts that "an entry made in a record of rights in accordance with the law for the time being in force . . . shall be presumed to be true until the contrary is proved or a new entry is lawfully substituted therefor."

Their Lordships agree with the Chief Court in thinking that the land in suit forms part of a graveyard set apart for the Mussulman community, and that by user, if not by dedication, the land is waqf. The entry in the record of rights seems conclusive on the point. It is obvious that, if it were held that within the area of the graveyard land unoccupied or apparently unoccupied by graves was private property and at the disposal of the recorded owner, it would lead to endless disputes, and the whole purpose of the Government in setting aside land as an open graveyard for the Mahomedan community in Multan would be frustrated.

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed.

The appellant will pay the costs of the appeal.

Solicitors for appellants : *T. L. Wilson & Co.*

Solicitors for respondents : *Ranken Ford, Ford & Chester.*

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1909, of which notice was given to the company on August 27 following, the deed being then sent to it for registration and duly registered by it on the same day.

Macleod J. dismissed the suit. He held that the respondent had obtained an equitable interest in the policy deposited with him, but that on August 13 the appellant had obtained the legal estate therein, and said: "On the contest between the owner of the legal estate and the prior equitable mortgagee, as nothing has been proved which should have put the owner of the legal estate on inquiry, and as it has not been proved that he had notice actual or constructive of the prior equitable charge, it follows that the owner of the legal estate must succeed."

The High Court held that, notwithstanding the provisions of s. 130 of the Transfer of Property Act (IV. of 1882) as amended by Act II. of 1900, the respondent had by the deposit of the policy with him acquired a charge thereon and upon the moneys secured thereby. They also held that it would be inconsistent with the provisions of that Act to hold that the appellant had gained priority over the respondent's charge by reason of his having first given notice to the company of a written assignment in his favour. The High Court also found on the evidence that at the time of the assignment the appellant had constructive notice of the respondent's charge. Upon the question of the respondent's title under the deposit the material passage of the judgment of the High Court is as follows:—

"The words of s. 130 are similar to the words in s. 54 and s. 59 which provide that transfers by way of sale or mortgage can be effected only by registered instrument in the case of transactions exceeding Rs.100 in value. The existence of these provisions however does not interfere with the creation of charges upon immovable property as is clear from the terms of s. 100. There is therefore no reason to suppose that that the words relied upon in s. 130 were intended to prohibit the creation of charges upon securities for money, or other documents of title not covered by s. 137. To use the words of Lord Macnaghten in *The Bank of New South Wales v. O'Connor* (1), 'it is a well-established rule of equity that a deposit of a document of

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title without either writing or a word of mouth will create in equity a charge upon the property to which the document relates to the extent of the interest of the person who makes the deposit. In the absence of consent that charge can only be displaced by actual payment of the amount secured.' The cases of *Crossley v. City of Glasgow Life Assurance Co.* (1) and *Spencer v. Clarke* (2) illustrate the application of this rule to policies of life insurance."

Upon the question of the appellant's title the material passage of that judgment is as follows :—

"The use of the expression 'legal estate' in connection with the transfer executed in favour of the defendant loses sight of the fact that in this case we are concerned with the law regarding the transfer of actionable claims or what in England is called the assignment of choses in action and not with the English law regarding legal and equitable estates in land. It is one of the conditions of a transfer of an actionable claim that the transferee takes it subject to the equities to which the transferor was subject in respect thereof at the date of the transfer. It is the same in England in the assignment of choses in action subject to the acquisition of priority by notice which we will shortly consider. The result is that (subject to the question of notice) equitable rights cannot be overridden and transferees stand in the same position inter se as possessors of equitable rights upon property of the nature of real estate. The closeness of this parallel is illustrated by the case of *In re Morgan, Pillgrem v. Pillgrem* (3), where Sir G. Jessel said of the deposittee of a trust lease with whom it had been deposited for his own purposes by a trustee who had renewed it in his own name, 'He was therefore a purchaser without notice, who did not get the legal title, therefore he must take the lease subject to prior equities, that is to the trust on which it was held.' Chapter VIII. of the Transfer of Property Act does not exactly reproduce the English law.

"In England 'where several successive assignments are made of the same debt or fund, the assignees presumptively take in order of date because each assignment is presumed to operate only upon the beneficial interest left in the assignor after the

(1) (1876) 4 Ch. D. 421.

(2) (1878) 9 Ch. D. 137.

(3) (1881) 18 Ch. D. 93.

prior assignments, but an assignee who takes without notice of any prior assignment may secure his own assignment by giving notice to the debtor and thereby obtain priority over the prior assignee who has neglected to give notice ' : Leake on Contracts, 4th ed., p. 832. Chapter VIII. of the Transfer of Property Act as amended by Act II. of 1900 contains no provision allowing a transferee giving notice to obtain priority over a previous transferee who had failed to give notice.

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“ Under the Act prior to the amendment, s. 131 provided that no transfer of any debt should have any operation against the debtor unless express notice of the transfer was given to him, unless he was otherwise aware of such transfer, and on receiving such notice the debtor was bound by s. 133 to give effect to the transfer. The validity of a transfer thus depended entirely upon the giving of notice. Therefore the person who gave no notice acquired no interest in the debt. These provisions went much further than the English law by which an assignment is good as between assignor and assignee although notice may not have been given to the debtor. As the law stands under the amended Indian Act the validity of the transfer in no way depends upon the giving of notice to the debtor although notice is necessary to prevent the debtor from dealing with the debt to the prejudice of the assignee. The English rule which permits an assignee to obtain priority over earlier assignees by giving notice no longer finds any counterpart in the Act.”

Younger, K.C., and *Lowndes*, for the appellant, contended that the respondent had not acquired any title to or interest in the policy moneys by virtue of the deposit of the policy with him. They referred to the Transfer of Property Act, s. 130, as amended by Act II. of 1900. The right to the proceeds of the policy was an actionable claim (see s. 3 of the Act). Sect. 130 applies as well to transfers by way of security as to absolute transfers and excludes the deposit made with the respondent from having any legal effect upon the title to the moneys. On the other hand the appellant has proved a bona fide written assignment thereof to him executed in the manner prescribed by s. 130. He acquired

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therefore a complete legal title of which he gave immediate notice to the insurance company. The respondent did not give any notice to the company of his deposit, and a claim by him against the appellant could only be made out if he proved that at the time of his acceptance of the assignment to him he had notice actual or constructive of the respondent's charge if any had been effected in his favour. The evidence to that effect was wholly insufficient. The transactions in this case entirely depended for their validity upon compliance with the terms of s. 130. Reference was made to the preceding sections, 3, 5, 6, 9, 54 and 59, and also to ss. 132 and 137; Shephard and Brown's Commentaries on the Act, 7th ed., p. 13; *Ex parte Whitbread*. (1)

De Gruyther, K.C., and *Kenworthy Brown*, for the respondent, contended that the High Court was right in deciding that both the parties had merely equitable rights and that the charge in favour of the respondent had priority, being the earlier creation. They relied also upon the evidence on which the High Court had found that the appellant did not take his assignment in good faith without notice of the respondent's claim. Sect. 130 does not prevent the respondent from having a valid charge by virtue of the deposit. On its true construction it relates to absolute assignments, that is of all the transferor's "rights and remedies," and not to transfer by way of charge where the transferor does not part with all his rights. For an illustration of this distinction see *Tancred v. Delagoa Bay and East Africa Ry. Co.* (2) Reference was also made to Act IV. of 1882, ss. 2 (b), 130, 134.

Counsel for the appellant were not heard in reply.

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The judgment of their Lordships was delivered by
 LORD MOULTON. The question in this appeal is as to whether the appellant or the respondent is entitled to a sum of Rs. 29,426.14.0 now standing in Court to abide the result of the action. It represents the net proceeds of a policy of insurance on the life of Dwarkadas Dharamsey, who died on August 28, 1909.

The appellant bases his claim on an assignment in writing

(1) (1812) 19 Ves. 209.

(2) (1889) 23 Q. B. D. 239, 241, 242.

under the hand of Dwarkadas Dharamsey, dated August 13, 1909. It is in form an absolute assignment, and was according to the evidence given under pressure from the appellant, to whom Dwarkadas Dharamsey was then indebted in a much larger sum. The validity of the assignment is therefore established. It may well be that although absolute in form it was intended to be only by way of security so as to be subject to a right of redemption, but this does not affect the rights of the parties under the circumstances of the present case.

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The respondent bases his claim upon a deposit of the policy with him by Dwarkadas Dharamsey undoubtedly with the intention of its acting as security for the payment of a debt then owing by him to the respondent. This deposit was made in November, 1904, and was unaccompanied by anything in writing. The particular debt owing at the time was subsequently paid off, but in and subsequently to April, 1909, Dwarkadas Dharamsey again became indebted to the respondent, and it is claimed that the deposit was made on the terms that it should act as security not only for the then existing debt but for any indebtedness that might subsequently arise. Whether or not this contention of fact is established is not in their Lordships' opinion material.

The decision of the matter in issue turns entirely on the interpretation of s. 130, sub-s. 1, of the Transfer of Property Act, 1900. It is as follows :—

“The transfer of an actionable claim shall be effected only by the execution of an instrument in writing, signed by the transferor or his duly authorised agent, and shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not :

“ Provided that every dealing with the debt or other actionable claim by the debtor or other person from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim, shall (save where the debtor or other person is a party to the transfer or has received express notice thereof as hereinafter provided) be valid as against such transfer.”

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It is admitted that the right to the moneys becoming due under the policy is an actionable claim. Their Lordships are also of opinion that the section covers transfers by way of security as well as absolute transfers. If any doubt existed on either of these two points it would be set at rest by the second illustration to the section which is given in the Act.

In the present case the respondent bases his claim on a deposit of the policy and not under a written transfer, and claims that this creates a charge on the policy. The section specifically enacts that such a proceeding shall not have any such effect; such a charge can only be created by a written document. It follows that the respondent acquired no right whatever to the policy or its proceeds by reason of the deposit.

The appellant on the other hand claims under an instrument in writing conforming in all respects to the provisions of the section. He therefore acquired by the execution of that instrument an absolute right to the proceeds of the policy.

The decision of the Court below was therefore erroneous. The error arose from the learned judges not having appreciated that the positive language of the section precluded the application in India of the principles of English law on which they based their decision.

Their Lordships will therefore humbly advise His Majesty that the appeal be allowed, and that it be declared that the appellant be entitled to the moneys standing in Court, and that the respondent pay the costs in the Courts below as well as the costs of this appeal.

Solicitors for appellant : *Waltons & Co.*

Solicitors for respondent : *Latteys & Hart.*

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SAIYID ABDULLAH KHAN	DEFENDANT ;	J. C.*
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TWO APPEALS CONSOLIDATED.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Indian Evidence Act, s. 92—Usufructuary Mortgage—Construction—Express Agreement cannot be varied by Preliminary Negotiations.

Where there is an express and unambiguous stipulation in a mortgage deed that the profits of the mortgaged property shall belong to the mortgagee in lieu of interest it cannot be varied or contradicted by reference to preliminary negotiations. Under the Indian Evidence Act effect must be given to it and the mortgage cannot be treated as usufructuary only in form.

Held, also, that a written but unregistered agreement made after the mortgagor had given up possession under a lease by the mortgagee as to the mode in which the rents and profits should be dealt with was inadmissible in evidence under Act III. of 1877.

CONSOLIDATED APPEALS from a decree of the High Court (December 22, 1908) partly reversing and partly affirming a decree of the Subordinate Judge of Meerut (December 22, 1906).

The suit was brought in 1905 for redemption of a mortgage dated August 25, 1880, which was in the name of the mortgagee's wife. On August 29 of the same year the mortgagee under his wife's power of attorney leased the mortgaged property to the mortgagor, who thus was in possession at an annual rent of Rs.4200, being 6 per cent. on Rs.70,000, the amount of the mortgage money.

Clause 4 of the mortgage deed, which provided by mutual consent that the mortgagee should be entitled to the profits of the mortgaged property in lieu of interest, is set out in their Lordships' judgment.

In June, 1881, the respondent gave up possession under his lease, and the mortgagee obtained possession under the terms of the mortgage deed.

* *Present* : LORD MACNAGHTEN, LORD MOULTON, SIR JOHN EDGE, and MR. AMEER ALI.

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By his suit in 1905 the respondent claimed an account of the rents and profits of the mortgaged property. He produced a document dated June 11, 1881, signed by the mortgagee's general attorney, which contained an undertaking by the mortgagee to apply all sums received in excess of Rs.4200 in liquidation of the mortgage amount. He further prayed for an account of the income derived by the mortgagee from cutting trees and other sources.

The appellant pleaded that he was entitled to all the rents and profits under the terms of the mortgage deed.

The Subordinate Judge upheld the appellant's plea as regards the rents and profits, but gave a decree against him as regards the income derived from the cutting down of trees and sale thereof and from other sources. He held that the respondent was barred by s. 92 of the Indian Evidence Act from shewing that the real transaction between the parties was to be gathered from the said mortgage and the lease read together. He treated them as separate transactions in law. Further, as to the circumstances under which the lease was relinquished by the plaintiff he found that although "there was some agreement between them" at the time, he did not believe the letter dated June 11, 1881, was genuine.

In appeal the High Court reversed the finding as to the letter of June 11, 1881, and held that "the provision in the mortgage deed that the profits of the mortgage property should belong to the mortgagee in lieu of interest was intended to be controlled by the arrangement carried out by the lease whereby the mortgagor was left in possession of the property, he undertaking to pay out of the rents and profits annually to the mortgagee Rs.4200"; "that the mortgage was in fact usufructuary only in name and that it was not intended at the date of its execution that the mortgagee should go into possession or receipt of the rents and profits. It was only when the mortgagor failed to pay the rent reserved by the lease that possession was taken"; "that the mortgage and lease must be read together as forming one transaction," and that being so the Court could not "give to the provision in the mortgage deed as to the acceptance of profits in lieu of interest its literal meaning"; and that the

language of this provision "must be taken to be controlled by the terms of the lease which provided that during the subsistence of the mortgage rent at the rate of Rs.4200 a year should be payable." It was also held that the fact that the mortgagor lessee gave up possession of the property and that the lease came thereby to an end made no difference, as "it was never the intention of the parties that the mortgagee if he took possession should put into his own pockets at least Rs. 2000 a year over and above the Rs.4200."

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The High Court on appeals by both parties decreed an account against the appellant of all rents and profits received by him from June 11, 1881, and after deducting Rs. 4200 a year as the interest properly payable under the mortgage of August 25, 1880, and also all proper expenditure, to give credit to the respondent for the surplus of the rents and profits and also any moneys received by him from tenants and others and to apply any surplus in payment of the amount due.

De Gruyther, K.C., and *O' Gorman*, for the appellant, contended that under the terms of the mortgage deed he was entitled to appropriate the whole of the income of the mortgaged property in lieu of interest and was not liable to render the account decreed. Its terms were unambiguous and no oral or other evidence could be admitted to vary them: see Act I. of 1872, s. 92. The mortgage and lease were separate transactions and should be so treated; and the lease having long ago been determined could have no present bearing on the rights and liabilities of the parties. The first Court was right on the evidence in holding that the letter of June 11, 1881, was not proved, but whether proved or not it had not been registered and was therefore inadmissible as affecting immovable property: see Registration Act III. of 1877, ss. 17 and 49. It was also contended that the appellant was entitled to compensation for the loss of income which he had sustained by the withdrawal from his possession of a share in the mortgaged property which belonged to his sister, though at the time of the mortgage he had represented himself as sole owner. They referred to Act IV. of 1882, s. 65 (a).

Sir Erle Richards, K.C., and *Dube*, for the respondent,

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contended that the High Court was right in reading the mortgage and lease together as parts of the same transaction. It resulted therefore that the parties intended the mortgage to be usufructuary only in name, and that it was not intended that the mortgagee should go into possession and into receipt of rents and profits freed from any liability to account in respect thereof. It was only when the respondent failed to pay the rent reserved by the lease that the mortgagee took possession, and he did so under the ordinary liability to account in respect of his receipts and to devote the surplus over and above the 6 per cent. interest to reduction of the mortgage amount. It was submitted also that the letter of June 11, 1881, was genuine and admissible; and reference was made to *Jawahir Singh v. Someshar Datt* (1); *Balkishen Das v. Legge*. (2)
De Gruyther, K.C., in reply.

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The judgment of their Lordships was delivered by LORD MACNAGHTEN. The respondents in these consolidated appeals are the representatives of the late plaintiff Saiyid Basharat Husain, now deceased, who was the owner of valuable zamindari property, subject to a mortgage dated August 25 1880, and three further charges tacked to it. The mortgage of 1880 and these further charges are now vested in the appellant.

The controversy in this case arose out of these mortgage transactions. The original mortgagee was Husain Ali Khan, who made the advances to Basharat Husain, and took the securites in the name of his wife.

Basharat Husain brought a suit for redemption. His right to redeem was not disputed. The only question was as to the terms and conditions on which the decree for redemption should be made.

On the part of the appellant it was maintained that the rights of the parties must be governed by the provisions of the mortgage deed of 1880, which was duly executed and duly registered. On the other hand the mortgagor contended (1.) that the real intention of the parties was to be gathered, not from the mortgage deed, but from negotiations and conversations alleged to

(1) (1905) L. R. 33 Ind. App. 42.

(2) (1899) L. R. 27. Ind. App. 58.

have taken place before the mortgage was executed ; and (2.) that, on the mortgagor relinquishing the mortgaged property which had been leased to him immediately after the date of the original mortgage, an agreement was come to between the mortgagee and the mortgagor as to the mode in which the rents and profits of the property were to be dealt with. The only evidence produced in support of this alleged agreement was a letter or rukka, neither registered nor witnessed, purporting to be dated June 11, 1881, and to be signed by the mortgagee (who died in 1886, ten years before the institution of the suit). The Subordinate Judge of Meerut, who was the trial judge, came to the conclusion that the document in question was a forgery. The learned judges of the High Court considered it genuine and gave effect to it. It is not necessary for their Lordships to determine whether the document is genuine or not. By the provisions of the Registration Act (Act III. of 1877) such a document being unregistered is inadmissible in evidence.

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As regards the first contention on the part of the mortgagor, which appears to have been argued at great length in the Courts below, it seems impossible to support the decision of the High Court. It is no more permissible in India than it is in this country to contradict or vary the express and unambiguous terms of a written instrument by reference to preliminary negotiations or previous conversations. The Indian Evidence Act is clear on the point.

The consideration for the mortgage of 1880 was the sum of Rs. 70,000. The mortgage was expressed to be for the term of eight years. The mortgage deed contains the following statement :—" It is agreed by mutual consent of the parties to this document that the profits of the property mortgaged shall belong to the aforesaid mortgagee in lieu of the interest on the mortgage money, and I, the mortgagee, shall have no claim for mesne profits. The mortgagee also shall have no right to claim interest on the mortgage money advanced by him."

The mortgagee relied on this provision. The learned judges of the High Court refused to give it any effect, holding that the mortgage was usufructuary only in form, and that the security was intended to be a simple mortgage carrying interest at the

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rate of 6 per cent. per annum. In coming to this conclusion the learned judges seem to have been influenced both by the preliminary negotiations to which the mortgagor and his witnesses deposed, and by the circumstance that by a deed practically contemporaneous with the mortgage the property was leased to the mortgagor for the period of the mortgage on very favourable terms at a rent which worked out at 6 per cent. per annum on the sum secured. The net profits of the property in mortgage were apparently not less than Rs. 6,000. The rent reserved was only Rs. 4,200. Favourable as the terms were, the mortgagor very soon fell into arrear. The mortgagee brought a suit against him, and he then gave up possession to the mortgagee. It may be that, if the mortgage deed means what it says, it would have been better for him to have fought the case out. Such is evidently the view of the High Court. But, after all, that is no concern of the Court. It was for the mortgagor to judge what was the wisest course for him to pursue.

Having regard to the eagerness of wealthy money-lenders to obtain security on zamindari property, and the competition among them for a position thought so advantageous, there does not seem to be anything strange in the apparently easy terms of the first mortgage transaction between the lender and the borrower.

Their Lordships agree with the High Court in thinking that the mortgage and the lease were part of one and the same transaction. But there is no inconsistency between the two instruments. Nor would there have been any inconsistency if the mortgage itself had contained a provision for granting a lease on the terms upon which the lease was actually granted.

One point was raised by the mortgagee before the Subordinate Judge on which he failed. It was not dealt with by the learned judges of the High Court because they were against the mortgagee on the main question. The point was raised again before this Board; it was this: Part of the property expressed to be mortgaged was withdrawn from the security in consequence of a successful claim to it by the mortgagor's sister. The mortgagee claimed damages or compensation for the diminution

of his security. The Subordinate Judge rejected that claim, being of opinion that the mortgagee when he took his security was aware of the circumstances of the property and the position of the mortgagor's family. Their Lordships think that the Subordinate Judge was right. They consider that the Transfer of Property Act, Act IV. of 1882, s. 65 (a), on which reliance was placed (whatever the construction of that section may be), can have no application to the present case where the mortgage was executed before the date of the Act, though one of the further charges was subsequent to it.

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Their Lordships will humbly advise His Majesty that the appeals should be allowed, the orders of the High Court discharged with costs (any costs paid thereunder being repaid), and the order of the Subordinate Judge restored.

The respondent will pay the costs of the appeals.
Solicitors for appellant : *Ranken Ford, Ford & Chester.*
Solicitors for respondent : *Barrow, Rogers & Nevill.*

TRIPURARI PAL AND ANOTHER PLAINTIFFS;
AND
JAGAT TARINI DASI AND OTHERS DEFENDANTS.

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ON APPEAL FROM THE HIGH COURT IN BENGAL.

Hindu Will—Vesting of an Absolute Estate—Gift over invalid.

An unqualified gift will not be cut down by subsequent words unless they clearly have that effect.
Application of this principle to the gift of a sebaitship and debottar estate by a Hindu will.

APPEAL from a judgment of the High Court (August 19, 1907) reversing a judgment of the Subordinate Judge of Nadia (September 20, 1905).

Shibchandra Pal, the testator in the case, by his will dated February 20, 1883, directed with regard to certain debottar estate which he had dedicated and certain religious

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ceremonies which he had established during his lifetime as follows : “ My present begotten son Mukunda Murari will be shebait for the performance of those ceremonies. If during the minority of the said Mukunda Murari Pal I die, then my second wife Srimati Brajamati Dasi, who gave birth to Mukunda Murari, will be shebait as his guardian, during the time of the said Mukunda Murari’s minority, and Mukunda Murari, on attaining majority, will personally conduct the work of the sheba. God forbid, if during my life time or after my death, the said Mukunda Murari dies, then the said Brajamati Dasi will be shebait and, after her death, Srimati Nistarini Dasi and Srimati Jagat Tarini Dasi, daughters born of the said Brajamati Dasi and of my loins, will be shebait.”

The testator died in January, 1884, Mukunda Murari Pal being at that time little more than three years old. Brajamati, his mother, during his minority conducted the worship and acted as sebait. On his attaining majority he took possession and acted as sebait till his death in October, 1900, leaving the appellants his minor son and widow. Brajamati then resumed possession of the testator’s estate, including the debottar property, and acted as sebait, but the minor son through his mother sued Brajamati and the daughters of the testator for a declaration that he had the sole right thereto as the heir of his father in whom it had previously vested absolutely on his attaining majority. Shortly afterwards Brajamati died, but the daughters defended the suit as regards the debottar properties, claiming that under the will they were entitled thereto.

The Subordinate Judge decreed in favour of the minor appellant, but the High Court held on the construction of the will that the sebaitship devolved upon the death of Mukunda Murari upon Brajamati Dasi, and upon her death it devolved on the respondents, and that the appellant had no right to the debottar properties. It said :

“ The testator, it seems to us, was anxious to provide, not for the descent of his property to his son and his son’s heirs, but for the maintenance and worship of his family idol, with a view probably to his own spiritual benefit. If he had wished his property to descend to his son and his son’s heirs, as the family

is one governed by the Dayabhaga law, he had only to make no will at all. The fact of his making a will shewed that he had another object in view. Then, the will nowhere gives the son Mukunda Murari an absolute right to the sebaitship on attaining majority. We consider he had only under the will a right to the sebaitship for his life. Nor does the will provide that it is only if Mukunda Murari dies before attaining majority that the widow is to succeed as sebait. The testator says, 'God forbid, if during my life time or after my death, the said Mukunda Murari dies.' This does not seem to us to mean 'if the said Mukunda Murari dies when a minor.'

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"The testator had already provided for the case of his dying and Mukunda Murari being then a minor, and, in the words immediately preceding this extract, he had provided for the case of his dying leaving Mukunda a minor, and of Mukunda subsequently becoming a major, when he was at once to become sebait, apparently for his life. So that when the testator says 'God forbid &c.,' he must rather have had in his mind the contingency of Mukunda being a major, than of his being still a minor."

A. M. Dunne, for the appellant, contended that this construction of the will was erroneous and that upon its true construction the title to the sebaitship and the debottar properties passed to the minor appellant on the death of his father. Murari Pal took an absolute estate therein and transmitted it to his son. The intention of the will was to provide for Murari Pal's death during minority, and in that case there was a gift over to the testator's widow and daughters. But a gift over after an estate has once vested is contrary to law. Reference was made to s. 111 of the Indian Succession Act, which was extended to Hindu wills by Act XXI. of 1870, and to *Norendra Nath Sircar v. Kamalbasini Dasi*. (1)

The respondents did not appear.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. Their Lordships are of opinion that in this case the decision of the High Court cannot be supported.

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There is, in their Lordships' view, an absolute gift of the seabait-ship to the son Mukunda Murari on his attaining his majority, and it is not cut down, as far as they can see, by anything that follows. There are provisions in the case of his death as a minor, but no provision cutting down the absolute gift to him. The words are : "My present begotten son Mukunda Murari will be shebait for the performance of those ceremonies."

Their Lordships will therefore humbly advise His Majesty that the appeal ought to be allowed, and the judgment of the Subordinate Judge restored.

There will be no order as to the costs incurred in the High Court, except that any costs paid under the order appealed from must be returned, and there will be no costs of this appeal.

Solicitors for appellants : W. W. Box & Co.

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PANDIT SURAJ NARAIN AND ANOTHER . . PLAINTIFFS ;
AND
PANDIT IKBAL NARAIN AND OTHERS . . DEFENDANTS.

ON APPEAL FROM THE COURT OF THE JUDICIAL
COMMISSIONER OF OUDH.

Partition of Hindu Joint Family Estate—Intention to separate must be clearly expressed—Separation from Commensality and Joint Worship.

Separation from commensality and joint worship does not necessarily effect a division of a joint undivided Hindu estate. An intention by one member of a joint family to separate himself and to enjoy his share in severalty will have that effect only if it is unequivocal and clearly expressed ; and it must depend upon the facts of each case whether partition is effected thereby.

Where separation from commensality and joint worship between two brothers was shewn to have arisen from a difference in their religious

* *Present* : LORD MACNAGHTEN, LORD MOULTON, SIR JOHN EDGE, and MR. AMEER ALI.

opinions, and there was evidence of conduct inconsistent with partition of title or with exclusion from joint enjoyment :—

Held, that a severance was not proved.

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APPEAL from a decree of the Court of the Judicial Commissioner (October 30, 1909) modifying a decree of the judge of Hardoi (August 27, 1908).

On June 20, 1905, the appellants Suraj Narain and his sons sued Bakht Narain and his sons for partition and possession of their half-share of the joint family property which had descended from Bishan Narain, their immediate ancestor.

Suraj Narain alleged that he had totally separated himself from Bakht Narain at the end of October, 1901, that there had been a "legal partition" of the properties, first made in November, 1900, and then in October, 1901, and he accordingly prayed for mesne profits in respect of the appellants' half-share from the end of October, 1901.

Bakht Narain denied the separation and partition as alleged and the right of the plaintiffs to mesne profits.

The first Court found that Suraj Narain had separated in mess and worship from Bakht Narain; that he received some moneys from joint funds, but that they were trifling sums, and not proportionate to his share; that he was excluded from the joint family properties, and that the possession of the respondents was wrongful to the extent of the plaintiffs' share. He held, therefore, that the plaintiffs were entitled to mesne profits to the extent of a half-share.

The Appellate Court found that there had been no separation between the branches of the joint family, of which Suraj Narain and Bakht Narain were the respective heads, up to the time when the former filed his suit, and that there had been no exclusion or circumstances justifying a decree for mesne profits.

De Gruyther, K.C., and *Dube*, for the appellants, contended that the family ceased to exist as a joint undivided Hindu family within the meaning of the Mitakshara law at latest in October, 1901. At that date Suraj Narain was proved by the evidence to have given notice of his intention to hold his share therein separately from his coparceners. Bakht Narain declined to give

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effect to the partition until the debts on the estate had been discharged. His consent, however, was unnecessary to the division of title. That could be effected on the authorities at the will of one member by giving oral expression of his intention to do so. Reference was made to *Rewun Persad v. Radha Beeby* (1), *Appovier v. Rama Subha Aiyar* (2), *Bulakee Lall v. Indurputtee Kowar* (3), *Vato Koer v. Rowshun Singh* (4), *Raghubanund Doss v. Sadhu Churn Doss* (5), *Sudarsanam Maistri v. Narasimhulu Maistri* (6), *Radhachurn Dass v. Kripa Sindhu Dass* (7), *Joy-narain Giri v. Grishchunder Myti* (8), *Rampershad Singh v. Lakh-pati Koer* (9), and *Balkishen Das v. Ram Narain Sahu*. (10) The evidence shewed that after October, 1901, the appellants had not participated in the joint profits of the family estate. They had been wrongfully excluded therefrom and were accordingly entitled to a decree for the mesne profits of their share.

A. M. Dunne, for the respondents, contended that the appellants had failed to prove any separation or partition as alleged. The onus was upon them to do so. But the evidence shewed that the parties had agreed as late as February, 1901, that the family should continue joint as before, and that in mutation proceedings in 1903 Bakht Narain's name was recorded with the consent of the appellants as head of the family and the names of Suraj Narain and another brother were recorded as joint proprietors. The evidence also failed to shew any exclusion of the appellants from participation in the joint profits; but on the contrary proved that Suraj Narain had been offered a share and had declined to receive it. The High Court was right in refusing a decree for mesne profits.

De Gruyther, K.C., in reply.

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The judgment of their Lordships was delivered by
 MR. AMEER ALI. The point for determination involved in this appeal turns on the question whether the plaintiffs, who were

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| (1) (1846) 4 Moo. Ind. Ap. 137, 168. | 156. |
| (2) (1866) 11 Moo. Ind. Ap. 75. | (7) (1879) I. L. R. 5 Calc. 474, |
| (3) (1865) 3 Suth. W. R. 41. | 476. |
| (4) (1867) 8 Suth. W. R. 82. | (8) (1878) L. R. 5 Ind. Ap. 228. |
| (5) (1878) I. L. R. 4 Calc. 425, 430. | (9) (1902) L. R. 30 Ind. Ap. 1, 11. |
| (6) (1901) I. L. R. 25 Madr. 149, | (10) (1903) L. R. 30 Ind. Ap. 139. |

admittedly members of a joint Hindu family governed by the Mitakshara law, separated as they allege in October, 1901, or whether they continued joint in property, if not in food and worship, as the defendants contend, up to the institution of the suit in 1905.

The parties are Kashmiri Brahmins settled in Oudh and, with the exception of the defendant Ratan Lal, are descended from one Pandit Bishan Narain, who died over forty years ago. He left four sons, of whom Pandit Suraj Narain, the first plaintiff, is the only one now surviving. On Bishan Narain's death his eldest son Raj Narain became the karta of the joint family. On his death in 1890, Ram Narain, the next in order of seniority, assumed charge of the family estate. He died in October, 1900, leaving a daughter who is married to the defendant Ratan Lal. Her son Raj Indar Narain appears to have been adopted by Ram Narain, and although his name frequently appears in the course of the present litigation he is no party to the action. On the death of Ram Narain, the defendant Bakht Narain, who has died since the institution of this suit, applied in November, 1900, for mutation of names in the Collector's register in respect of the joint family property. On December 8, 1900, Suraj Narain filed a petition objecting to the mutation being effected in Bakht Narain's name alone, and praying that his name along with the plaintiffs' and Raj Indar Narain's might be entered in equal shares.

Some action appears to have been taken by the revenue authorities on the application of Bakht Narain, but, before any definite order was made, the parties came to a settlement which was embodied in a deed of compromise. This document bears date February 27, 1901, and, after reciting the facts connected with Suraj Narain's application, proceeds to state as follows: "Hence in submitting this application we pray that mutation of names be effected in favour of Pandit Bakht Narain alone as the head of a joint family, and the status of the family has continued joint from the death of Pandit Ram Narain up to this day and shall remain so as long as any dispute does not arise among the heirs."

Bakht Narain's name was accordingly entered with regard to

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the entire joint estate, and matters apparently remained in statu quo for the next two years. In consequence of some quarrel with his elder brother, Suraj Narain on May 5, 1903, applied to the revenue authorities to have his and Raj Indar Narain's names entered jointly in respect of two-thirds of the family properties.

The differences between the brothers seem to have been mainly connected with the question of shares the two branches of the family would take upon a partition. As Bakht Narain had three sons and Suraj Narain had only two, the latter evidently apprehended that if the division were to be made per capita his branch would obtain a smaller share. The compromise of February, 1901, which provided for a reference to the Advocate-General was really intended to remove this fear on the part of Suraj Narain.

On August 31, 1903, the Assistant Collector made an order in favour of Suraj Narain. This order was reversed on appeal by the Deputy Commissioner on October 30, 1903. The Deputy Commissioner embodies in his judgment the actual contentions advanced before him by the parties, which afford a strong indication of the views they then took of the position of the family. Their Lordships will refer to this document when dealing with the arguments at the Bar on this appeal.

After the Deputy Commissioner's order, Suraj Narain returned to the service of the Amethi estate and remained there up to the end of 1904. In June, 1905, he, in conjunction with his surviving son, brought the present suit against Bakht Narain and his sons for a partition of the family properties. The various proceedings in the suit of Bakht Narain against Ratan Lal, in which Suraj Narain attempted to be joined as a plaintiff, have no direct bearing on the question their Lordships have to consider.

In the present action the plaintiffs, Suraj Narain and his son, claimed to recover mesne profits from Bakht Narain and his branch of the family, on the ground that they had separated from the joint family in October, 1901. Their contention was accepted by the Subordinate Judge, who made a decree in their favour on that basis. The Judicial Commissioners have on appeal reversed his decision; and the present appeal to His

Majesty in Council is from their judgment. The learned judges have carefully and elaborately examined the evidence on the question of the alleged separation in October, 1901; and as their Lordships agree with the main conclusions of the Court below, they do not consider it necessary to deal with the matter in detail.

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The principle applicable to cases of separation from the joint undivided family has been clearly enunciated by this Board in *Rewun Persad v. Radha Beeby* (1) and the well-known case of *Appovier*. (2) What may amount to a separation or what conduct on the part of some of the members may lead to disruption of the joint undivided family and convert a joint tenancy into a tenancy in common must depend on the facts of each case. A definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty may amount to separation. But to have that effect the intention must be unequivocal and clearly expressed. In the present case that element appears to their Lordships to be wholly wanting. By the compromise of February the parties had agreed to retain the status of jointness which had existed till then "until any dispute arose among the heirs." Suraj Narain alleges that he separated a few months later; there is, however, no writing in support of his allegation, nothing to shew that at that time he gave expression to an unambiguous intention on his part to cut himself off from the joint undivided family. The oral evidence on which the allegation has mainly rested, as the learned judges in the Court below point out, is either inconclusive or unreliable. On the other hand, his conduct, borne out by documents, is clearly against his contention. After the compromise of February, 1901, the mutation proceedings instituted by Bakht Narain in November, 1900, were continued, and on January 2, 1902, the revenue officer directed that the statements of the two brothers should be recorded "to ascertain in whose name the entry should be made." And on February 8 the officer in question made the following order:—

"As the statements of Pandit Bakht Narain and Suraj Narain

(1) 4 Moo. Ind. Ap. 137.

(2) 11 Moo. Ind. Ap. 75.

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have been received and they unanimously show their willingness for the entry of the name of Bakht Narain and declare his possession also, and as no one has filed any objection, it is therefore ordered that, after expunging the name of Ram Narain, deceased, the name of Bakht Narain be entered and the file be submitted to the officer in charge of Pargana for sanction."

The conduct of Suraj Narain on this occasion was certainly not consistent with his allegation that he had severed his connection with the joint family, of which Bakht Narain was the acknowledged "head," in October, 1901.

In his application of May 5, 1903, among other matters, he speaks of a separation in "mess and worship," but there is no mention of a division of rights in property. Had his present statement been true, some reference would unquestionably have been made to it in this document. Separation from commensality, as was observed in the case of *Rewun Persad v. Radha Beeby* (1), does not as a necessary consequence effect a division of the joint undivided property. A separation in mess and worship may be due to various causes, and yet the family may continue joint in estate. In the present case there is evidence to shew it arose from a difference in the religious opinions of the two brothers.

But the conduct of Suraj Narain after the order of the Deputy Commissioner on October 30, 1903, and the statements of his pleader before that officer, leave no doubt in their Lordships' mind that his present allegation is unfounded. The passage in the Deputy Commissioner's judgment which gives the substance of these statements is important. After reciting some of the facts connected with the dispute before him, the judgment proceeds thus :

" Ultimately on the 29th February, 1901 [*sic*], by virtue of a compromise, the name of Bakht Narain was entered as *manager* and *head* of a joint Hindu family. By a clause at the end of this agreement Bakht Narain was to remain so recorded so long as there should be no dispute among the *warisan*. There is now a discussion as to the meaning of the word *warisan*.

" Mr. Jackson for appellant argues that it clearly prefers to

the *heirs* of the executant of the compromise. Mr. Champat Rai for the respondent maintains that it refers to the executants themselves ; and as they are now in disagreement he wishes to have his client's name recorded in the Government registers.

"Here it is necessary to say that there is a third party, Raj Indar Narain, said to be the adopted son of Ram Narain.

"Bakht Narain now denies the validity of the adoption."

And the order is, "I think that Suraj Narain and Raj Indar Narain" (the applicants in that case) "should go to the Civil Court and get their shares clearly defined."

The statement of Mr. Champat Rai appears to their Lordships to involve a clear admission that the joint status had continued till then ; and that as the parties were, to use his words as recorded by the Deputy Commissioner, "now in disagreement," he wished to have his client's name recorded in the Government registers.

After the dismissal of his application, as already observed, Suraj Narain went away to Amethi without making an attempt to go to the Civil Court. Although Suraj Narain made various attempts to come in as a plaintiff in the suit Bakht Narain had brought against Ratan Lal, it may be taken as well established that after the Deputy Commissioner's order matters remained in statu quo until the present action was instituted. Their Lordships are of opinion that the allegation regarding a separation in October, 1901, of rights in property fails, and that the view of the learned judges in the Court below is well founded, that the plaintiffs are not entitled to claim mesne profits on that basis.

But it is urged that as the plaintiffs did not, after the disputes arose between the two brothers, receive any profits from the joint estate, they are entitled to mesne profits on the ground of exclusion. The evidence is clear and distinct on this point, and shews that Bakht Narain was all along offering Suraj Narain an allowance of Rs. 200 a month, which he refused to accept as being inadequate. This certainly does not, in their Lordships' judgment, amount to exclusion from the joint estate.

On the whole their Lordships are of opinion that this

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appeal fails and ought to be dismissed with costs, and their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants : *Barrow, Rogers & Nevill.*
Solicitors for respondents : *Pemberton, Cope, Gray & Co.*



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SECRETARY OF STATE FOR INDIA IN }
COUNCIL } DEFENDANT ;

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ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA.

Imperial Government of India Act, 1858, s. 65 —Burma Act IV. of 1898, s. 41 (b), ultra vires—Remedy of the Subject against the Government in respect of Land.

Sect. 41 (b) of Act IV. of 1898 (Burma), which enacts that no Civil Court is to have jurisdiction to determine a claim to any right over land as against the Government, is ultra vires, as being in contravention of s. 65 of the Government of India Act, 1858. That section provides that there is to be the same remedy for the subject against the Government as there would have been against the East India Company, and it cannot be repealed by an Indian Legislature :—

Held, that a suit for damages for wrongful interference with the plaintiff's property in land would have lain against the East India Company.

Peninsular and Oriental S. N. Co. v. Secretary of State for India (1861) 5 Bomb. H. C. R., appendix, approved.

APPEAL from a judgment of the Chief Court (March 7, 1910) reversing a judgment of the said Court in its original jurisdiction (January 28, 1908).

The respondent, who had by process of law recovered possession of the land and buildings hereinafter mentioned, sued on September 8, 1906, to recover damages against the appellant for wrongful interference therewith. The appellant pleaded inter

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alia that the suit was barred by s. 41 (b) of Act IV. of 1898 (Burma). The section is as follows :

"No Civil Court shall have jurisdiction to determine
 "(b) any claim to any right over land as against the Government."

The judgment of January 28, 1908, was that under that section the Court had no jurisdiction to entertain the suit.

The respondent appealed, contending that s. 41 (b) was ultra vires, and the Chief Court referred the question of law to the Full Bench, which held on February 14, 1910 (see 5 Lower Burma Rep. 163), by a majority of three to one, that the section was ultra vires of the Burma Legislative Council. The judgment of March 7, 1910, was in accordance with this decision, and, holding that the suit was not barred, remanded it for trial on the merits.

The main objection urged by the respondent to the validity of the section relied upon was that it contravened the provisions of s. 65 of the Government of India Act, 1858 (21 & 22 Vict. c. 106), which is cited in their Lordships' judgment.

Upon this point Fox, Chief Judge, said : "If persons and bodies politic could previous to the Act have sued the East India Company in respect of a claim to land, persons in Burma at the present day are in a different and obviously worse position in respect to claims as against Government to land in towns and villages from that in which people were in 1858, for if the clause under reference is valid, although they may institute suits in respect of claims to land, they cannot have such claims determined by a Civil Court."

After reviewing the authorities, he added : "In the absence of anything being shewn to the contrary I think it must be taken that before the transfer of the territories under the Government of the East India Company to the Crown, members of the public in Burma could sue the Company upon claims to or in connection with land."

Robinson J. on the other hand held that the true construction of s. 65 of the Act of 1858 was, that whereas the only legal remedy against the Crown would have been by petition of right, that section provided that the subject should have the same remedy (that is by suit) against the Crown as it formerly had

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against the East India Company. The intention was to secure the rights of the subject, leaving it to the local Legislature to decide whether the remedy should be in a Civil or Revenue Court. He was of opinion therefore that this clause was not ultra vires.

Sir Erle Richards, K.C., and *Dunne*, for the appellant, contended that the section was not ultra vires. It had not taken away all remedy against the Government in suits respecting rights over land. It merely took away the jurisdiction of the Court to entertain, try, and decide such suits. Sec. 65 of the Act of 1858 meant on its true construction that the rights of the subject against the Crown should remain the same as before and that he should not be deprived of his remedy. But it did not intend that the remedy should always remain the same and should be incapable of alteration. The particular mode of enforcing such rights was within the discretion of the Legislature, and accordingly it had power by s. 41 (b) to exclude the jurisdiction of the Court over particular suits. Sect. 65 ought not to be so construed as to withdraw the procedure to be adopted by the subject from the control of the Legislature. At the time that Act IV. of 1898 (Burma) was passed the Acts which regulated legislative power in India were the Indian Council Acts of 1861, 1869, 1871, 1874, and 1892. Sect. 22 of the first of these Acts was referred to.

[VISCOUNT HALDANE L. C. The whole point turns on s. 65 of the Act of 1858.]

Reference was made to 13 Geo. 3, c. 63, and 3 & 4 Will. 4, c. 85; *Peninsular and Oriental Steam Navigation Co. v. Secretary of State* (1); and *Vasudev Sadashiv Modak v. Collector of Ratnagiri*. (2)

De Gruyther, K.C., *Eddis*, and *A. P. Pennell*, for the respondent, were not heard.

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The judgment of their Lordships was delivered by

VISCOUNT HALDANE L.C. This appeal raises the question whether the Government of India could make a law the effect of which was to debar a Civil Court from entertaining a claim against the Government to any right over land. The question is

(1) 5 Bomb. H.C., App. A, 1, 4, 5, 7.

(2) (1877) L. R. 4 Ind. Ap. 119.

obviously one of great importance. The proceedings out of which the appeal arises related to an ordinary dispute about the title to land, in the course of which there emerged a claim to damages for wrongful interference with the plaintiff's property. The only point which their Lordships have to decide is whether s. 41 (b) of the Act IV. of 1898 (Burma) was validly enacted. A majority of the judges of the Chief Court of Lower Burma have held that it was not, and the Secretary of State appeals against the judgment.

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* The section enacts that no Civil Court is to have jurisdiction to determine a claim to any right over land as against the Government. In the Court below it was held that this enactment was ultra vires as contravening a provision in s. 65 of the Government of India Act, 1858, that there is to be the same remedy for the subject against the Government as there would have been against the East India Company.

Their Lordships are satisfied that a suit of this character would have lain against the Company. The reasons for so holding are fully explained in the judgment of Sir Barnes Peacock C. J. in *Peninsular and Oriental Co. v. Secretary of State*, reported in the appendix to vol. 5 of the Bombay High Court Reports, and the only question is whether it was competent for the Government of India to take away the existing right to sue in a Civil Court. This turns on the construction of the Act of 1858, and of the Indian Councils Act of 1861. Their Lordships have examined the provisions of the Acts of 13 Geo. 3, c. 63, and 3 & 4 Will. 4, c. 85, to which reference was made in the course of the argument, but these statutes do not appear to materially affect the argument.

The Act of 1858 declared that India was to be governed directly and in the name of the Crown, acting through a Secretary of State aided by a Council, and to him were transferred the powers formerly exercised by the Court of Directors and the Board of Control. The property of the old East India Company was vested in the Crown. The Secretary of State was given a quasi-corporate character to enable him to assert the rights and discharge the liabilities devolving on him as successor to the East India Company. The material words of s. 65 enact that "the Secretary of State in Council shall and may sue and

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be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate; and all persons and bodies politic shall and may have and take the same suits remedies and proceedings, legal and equitable, against the Secretary of State in Council of India as they could have done against the said Company." Sect. 66 is a transitory provision making the Secretary of State in Council come in place of the Company in all proceedings pending at the commencement of the Act, without the necessity of a change of name. Sect. 67 is also a transitory provision making engagements of the Company entered into before the commencement of the Act binding on the Crown and enforceable against the Secretary of State in Council in the same manner and in the same Courts as they would have been in the case of the Company had the Act not passed.

By s. 22 of the Indian Councils Act of 1861 the Governor-General in Council is given power to make laws in the manner provided, including power to repeal or amend existing laws, and including the making of laws for all Courts of justice. But a proviso to this section enacts that there is to be no power to repeal or in any way affect, among other matters, any provision of the Government of India Act, 1858.

Their Lordships are of opinion that the effect of s. 65 of the Act of 1858 was to debar the Government of India from passing any Act which could prevent a subject from suing the Secretary of State in Council in a Civil Court in any case in which he could have similarly sued the East India Company. They think that the words cannot be construed in any different sense without reading into them a qualification which is not there, and which may well have been deliberately omitted. The section is not, like the two which follow it, a merely transitory section. It appears, judging from the language employed, to have been inserted for the purpose of making it clear that the subject was to have the right of so suing and was to retain that right in the future, or at least until the British Parliament should take it away. It may well be that the Indian Government can legislate validly about the formalities of procedure so long as they preserve the substantial right of the subject to sue the Government in the Civil Courts like any other defendant, and do not

violate the fundamental principle that the Secretary of State, even as representing the Crown, is to be in no position different from that of the old East India Company. But the question before their Lordships is not one of procedure. It is whether the Government of India can by legislation take away the right to proceed against it in a Civil Court in a case involving a right over land. Their Lordships have come to the clear conclusion that the language of s. 65 of the Act of 1858 renders such legislation ultra vires.

It was suggested in the course of the argument for the appellant that a different view must have been taken by this Board in the case of *Vasudev Sadasiv Modak v. The Collector of Ratnagiri*. (1) The answer is that no such point was raised for decision.

Their Lordships will humbly advise that the appeal should be dismissed with costs.

Solicitor for appellant : *The Solicitor, India Office.*

Solicitors for respondent : *Sanderson, Adkin, Lee & Eddis.*

(1) L. R. 4 Ind. Ap. 119.

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ON APPEAL FROM THE HIGH COURT IN BENGAL.

Bengal Land Revenue Sales Act, 1868 (Bengal Act VII of 1868), s. 2—Order of Commissioner—"Final"—Review of Order.

The Bengal Land Revenue Act, 1868, by s. 2 provides that the order of the Commissioner, upon an appeal to him under that Act, shall be "final." A Commissioner, upon such an appeal, made an order annulling the sale in question. Afterwards, being of opinion that this order was wrong in law, he reviewed it, and made an order upholding the sale:—

Held, that the Commissioner had no power so to review his order.

APPEAL from a decree of the High Court (May 14, 1907) affirming a decree of the additional Subordinate Judge of Monghyr (November 28, 1905).

On January 2, 1900, a mahal in which the respondent was a co-sharer was sold for arrears of revenue. Two appeals to annul the sale were preferred to the Commissioner under the Bengal Land Revenue Sales Act, 1859, s. 33, as amended by the Bengal Land Revenue Sales Act, 1868. One of these appeals was by the respondent, and was dismissed on the ground that the auction purchaser had not been made a defendant. The second appeal was by other co-sharers in the mahal, and in this appeal the Commissioner, on March 23, 1900, made an order annulling the sale on the ground of an irregularity in the sale notice. This order referred to the entire mahal.

On June 21, 1900, the Commissioner having come to the conclusion that his order of March 23, 1900, was wrong in law, reviewed it and made an order upholding the sale.

On November 21, 1900, a sale certificate was issued to the auction purchaser, who went into possession.

On June 20, 1901, the respondent commenced the present suit, praying for a declaration that the order of June 21, 1900, was

* *Present*: LORD ATKINSON, LORD MOULTON SIR JOHN EDGE, and MR. AMEER ALI.

ultra vires and illegal and for a decree for recovery of possession and mesne profits.

The additional Subordinate Judge of Monghyr, who tried the suit, held that the order of March 23, 1900, setting aside the sale was a final order and was not open to review. He therefore made the order prayed for by the respondent.

The High Court affirmed this decision.

De Gruyther, K.C., and *Branson*, for the appellant. There is no provision in the Acts of 1859 and 1868, or elsewhere, as to the conduct of proceedings thereunder before the Commissioner. He has power to settle his own procedure, including a discretionary power to review his own decision *Badaricharya v. Ramchandra Gopal Savant* (1); *Ramchandra v. Draupadi*. (2) The word "final" in s. 2 of the Act of 1868 means only "not subject to appeal." The Commissioner, acting as a revenue officer, had a discretionary power to review his order: *Mantangini Debi v. Girish Chandra*. (3) The decision in *Lala Pryag Lal v. Jai Narayan Singh* (4) rested upon the fact that the Code of Civil Procedure was in fact expressly made applicable to the Act of 1880, then under discussion; from this it was inferred that the provisions of the Code relating to review were intended to be excluded. This is not applicable to the Act of 1868.

Dube, for the respondent, was not called upon.

The judgment of their Lordships was delivered by

LORD ATKINSON. Their Lordships are clearly of opinion that the order of March 23, 1900, was final and conclusive, and that, so far as the Commissioner was concerned, he had no power to review that order in the way in which he has reviewed it. That is the only point in the case. They will humbly advise His Majesty that the appeal ought to be dismissed.

The appellant must pay the costs.

Solicitors for appellant: *Watkins & Hunter*.

Solicitors for respondent: *Barrow, Rogers & Nevill*.

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(1) (1893) I. L. R. 19 Bomb. 113.

(2) (1895) I. L. R. 20 Bomb. 281.

(3) (1903) I. L. R. 30 Calc. 619.

(4) (1895) I. L. R. 22 Calc. 419.

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Feb. 6, 7, 25. THE NATIONAL BANK OF INDIA, LIMITED. DEFENDANTS
ON APPEAL FROM THE CHIEF COURT OF THE PUNJAB.

Indian Contract Act (IX of 1872), ss. 15 and 72—Wrongful Attachment of Property—"Coercion"—Suit to recover Money paid—Voluntary Payment.

The plaintiff in a suit alleged by his plaint that he was the sole proprietor of certain cotton mills and their contents ; that the defendants, who had a money decree against a limited company, obtained thereunder an attachment against his said property for Rs. 83,005, took possession, and prevented him from working the mills ; that he was, in consequence, compelled to pay to the defendants, under protest, the above sum, which he claimed to recover in the suit :—

Held, that the word " coercion " in s. 72 of the Indian Contract Act, 1872, is used in its general and ordinary sense, its meaning not being controlled by the definition of " coercion " in s. 15 of that Act, and that the facts alleged by the plaint constituted a good cause of action.

APPEAL from a judgment and order of the Chief Court (January 27, 1911) affirming an order of the District Judge, Delhi (November 18, 1902), dismissing the appellant's suit.

On August 28, 1902, the appellant, as plaintiff, commenced a suit against the respondents.

By his plaint the appellant alleged that he had since June 25, 1902, been the sole proprietor of certain mills at Sabzi Mandi, Delhi, and of the machinery and other property therein, and that the respondents having obtained a money decree against the Delhi Cotton Mills Company, Limited, obtained warrants of attachment against his said mills, premises, and the property therein, and on August 20, 1902, wrongfully took possession of them thereunder, to obtain satisfaction for a sum of Rs. 83,005, the balance then unpaid under the said decree.

By paragraphs (4.), (5.), and (7.) of his plaint the appellant alleged substantially as follows :—That on August 20, 1902, the respondents' manager, accompanied by the bailiff of the Court

* *Present* : LORD SHAW OF DUNFERMLINE, LORD MOULTON, SIR JOHN EDGE, and MR. AMEER ALI.

and several peons, forcibly entered the said premises and dispossessed the appellant's servants, and professed to attach all the movable effects and placed the same under lock and key, leaving certain peons in charge thereof; that subsequently the respondents had by their servants forcibly entered the premises; that the appellant was, by reason of these acts of the respondents, practically ousted from his mills and could not work them; that the continuing damage to the appellant was very great, and that, as it was probable that by objection to the attachment under the Civil Procedure Code a considerable period would elapse before he could obtain an order setting aside the attachment, the appellant was compelled on August 27, 1902, to pay to the respondents, under protest, the sum of Rs.83,005, being the balance due to the respondents under their decree against the said company.

The appellant claimed by his plaint to recover the said Rs.83,005, and he further claimed Rs.10,000 as damages. The respondents in reply to this plaint filed preliminary pleas by way of demurrer relating to the claim for the return of the money paid under protest. The first of these pleas was that "the suit as framed will not lie." They also traversed all the facts alleged in relation to the claim for damages.

On these pleadings the District Judge framed certain preliminary issues, which in substance amounted to this question: Did the appellant's plaint shew any cause of action for the return of the money paid? These issues were argued before the District Judge upon the hypothesis that the facts alleged by the appellant in his plaint were true.

The District Judge on November 18, 1902, delivered judgment upon the preliminary issues. He held that no action could lie under s. 72 of the Indian Contract Act unless the facts alleged amounted to "coercion" within the definition in s. 15 of that Act, and that they did not do so. He was, however, of opinion that the Contract Act was not exhaustive, and that the plaintiff (appellant) could claim for money had and received, if the facts shewed such a cause of action apart from that Act, but he held that the payment was in law a voluntary payment and not recoverable. The appellant's suit for recovery of the money

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paid was accordingly dismissed, the District Judge directing that the case should proceed upon the question of damages only.

After certain proceedings, including an appeal to His Majesty in Council, which proceedings have no direct bearing upon the question raised by the present appeal, and which are referred to in the judgment, the order of the District Judge dismissing the claim for the return of the money paid came before the Chief Court upon appeal.

The Chief Court (Johnstone and Rattigan JJ.) on January 27, 1911, gave judgment dismissing the appeal. In the course of their judgment they said as follows :—

“In our opinion s. 72 of the Indian Contract Act, which specifically deals with the question as to when money must be repaid or a thing returned, must be regarded as exhaustive, apart, of course, from other specific provisions of the law such as s. 86 of the Indian Trusts Act. The law as it obtains in England probably goes much beyond s. 72 of the Indian Contract Act, which makes no express provision for cases where fraud has induced the payment of money or where money has been paid through such extortion, oppression, or undue influence as do not amount to ‘coercion’ within the meaning of s. 15 of the Act. It seems to us, therefore, that the plaintiff in order to succeed in the present case must shew that he paid the money as the result of ‘coercion’ within the meaning of s. 15.”

They agreed with the District Judge that the allegations in the plaint did not disclose any case of “coercion” within that section. They also held, differing on this point from the judgment of the District Judge, that the action could not succeed unless it came within the provision of s. 72 of the Act, and they said further :—

“But even if this is not so we are nevertheless of opinion that in the case before us the payment made by the plaintiff was ‘voluntary.’ He was certainly not obliged to pay the money into Court, nor, at the time when the money was so paid, were the circumstances such that the plaintiff, if he wished to save his property, had no alternative to making the payment. The property, no doubt, was attached, but there was no order for sale and the plaintiff was entitled, if he thought fit, to object to

the attachment or to institute a suit for a decree declaratory of his rights thereto. In either case he would have had no difficulty in securing from the Court an order staying all further proceedings in execution until his claim had been considered."

The Chief Court accordingly dismissed the appeal.

De Gruyther, K.C., and O'Gorman (Palat with them), for the appellant. The Chief Court was wrong in holding that the appellant could only succeed if the facts alleged came within s. 72 of the Indian Contract Act, and that the meaning of "coercion" in that section is limited by the definition in s. 15 of that Act. The Indian Contract Act is not intended to be exhaustive; by its preamble the object of the Act is stated to be "to define and amend certain parts of the law relating to contracts." Sect. 72 does not affect the principle that where a defendant has received money in circumstances which render the receipt of it, in justice and equity, a receipt to the use of the plaintiff an action will lie to recover it: *Jugdeo Narain Singh v. Rajah Singh* (1); *Narayansami Reddi v. Osuru Reddi*. (2) The facts alleged in the plaint give rise to a good cause of action: *Dooli Chand v. Ram Kishen Singh*. (3)

If s. 72 is exhaustive of the cases in which an action lies to recover money paid the present facts come within that section, for "coercion" is there used in its ordinary meaning and is not limited by the definition in s. 15. The definition in s. 15 is introduced merely for the purpose of Chap. II., of which it forms part, and which deals with void and voidable contracts. This is shewn from the wording of s. 14, which refers to "coercion, as defined in s. 15." Sect. 72 deals with an entirely different matter, and does not in terms refer to s. 15. Illustration (b) to s. 72 is not consistent with "coercion" in that section being limited by the definition in s. 15.

The Chief Court in holding that the payment was voluntary did not give full effect to the facts alleged in the plaint. It is true that the appellant, instead of paying out the attachment, might have proceeded under s. 278 of the Civil Procedure Code,

(1) (1888) I. L. R. 15 Calc. 656. (2) (1901) I. L. R. 25 Madr. 548.

(3) (1881) L. R. 8 Ind. Ap. 93.

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1882. This, however, would have caused delay and further loss. But whether such proceedings would or would not have been a convenient remedy is not material, for it is not for the wrongdoer to say which of the available remedies the appellant should have pursued.

Astbury, K.C., and Arthur Gray, for the respondents. The payment made by the appellant was a voluntary payment and is not recoverable. The authorities shew that where a person having a choice either of resisting legal proceedings or of paying money adopts the latter alternative as a course more convenient to himself, he cannot afterwards recover the money : *Mariot v. Hampton* (1) ; *Moore v. Vestry of Fulham*. (2) This is clearly so where the payment is by a person against whom an action is brought, and the principle, as laid down by Lord Lindley in the last-named case, is equally applicable to a case where, as here, the payer could by taking the proper proceedings become a litigating party and subject the claim to judicial decision.

The Indian Contract Act is exhaustive, at all events except with regard to certain classes of contracts, such as those relating to carriers, as to which the law is definite : *Mohori Bibee v. Dhurmodas Ghose*. (3) The definition in s. 15 applies to "coercion" as used in s. 72, the object of the Legislature being to define clearly a class of action of which under English law the limits are vague. Unless s. 72 is so limited it is useless and redundant. *Dooli Chand v. Ram Kishen Singh* (4) is distinguishable, because in that case the mortgage debt in respect of which the decree had been obtained was satisfied at the time of the attachment. *Jugdeo Narain Singh v. Rajah Singh* (5) is also distinguishable, for there the plaintiff had exhausted his remedies and a sale was imminent and inevitable.

It would be inequitable in the present case to allow the appellant to recover, since the course which he has elected to pursue has prevented the respondents from obtaining satisfaction for their decree obtained in 1902 against the Delhi Cotton

(1) 2 Sm. L. C. 11th ed. 491.

125.

(2) [1895] 1 Q. B. 399, 403.

(4) L. R. 8 Ind. Ap. 93.

(3) (1903) L. R. 30 Ind. Ap. 114.

(5) I. L. R. 15 Calc. 656.

Mills Company, Limited. The Court will not assist a plaintiff to recover where it would be inequitable so to do : *Freeman v. Jeffries*. (1)

No reply was called for.

The judgment of their Lordships was delivered by

LORD MOULTON. In order to render plain the nature of the question involved in the present appeal it will be necessary to make a short reference to the history of the litigation between the parties. It furnishes abundant matter for regret. The suit was brought on August 28, 1902, and owing to the procedure adopted it will be found that at the present date the matter is but little more advanced than it was ten years ago, in spite of the fact that large sums must have been expended in the costs of the proceedings in the meantime.

The facts of the case, so far as they are relevant to the question involved in the appeal, are very simple. On August 15, 1902, the defendant bank, which had obtained a decree against the Delhi Cotton Mills Company, Limited, obtained an attachment against certain mills at Sabzi Mandi, and on August 20, 1902, took possession of them to obtain satisfaction for a sum of Rs.83,005, the balance then unpaid under such decree. In his plaint the plaintiff states that he was the sole proprietor of such mills and of their contents. On thus being ousted from his property he took the course of paying under protest the sum claimed. Having thus freed his property from the attachment, he at once brought the present action claiming the return of the money so paid and damages for the alleged illegal acts of the defendants.

In reply to the above plaint the respondent bank filed certain preliminary pleas relating to the claim for the return of the money paid under protest, of which it is only necessary to cite the first, which was that "the suit as framed will not lie." It is admitted that this plea is in substance identical with the more usual form of plea, namely, that "the plaint discloses no cause of action."

The District Judge—no doubt with the laudable intention of

(1) (1869) L. R. 4 Ex. 189, 199.

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shortening the proceedings and thereby lessening the costs—heard an argument on these preliminary pleas before requiring anything further to be done by the defendants, and on November 18, 1902, he gave judgment to the effect that so far as the recovery of the money was concerned the plaint disclosed no cause of action. He therefore dismissed with costs the claim for the recovery of the money and directed that the action should proceed on the question of damages for illegal attachment. The plaintiff, having in vain applied for the drawing up of an order embodying this decision, decided not to proceed with that part of the case which related to damages, and consequently did not appear on the further hearing, whereupon the District Judge dismissed the whole case for default under s. 102 of the Civil Procedure Code, 1882. The plaintiff appealed to the Chief Court against this decision, and that Court dismissed the appeal on the ground that no appeal lay against an order dismissing a suit under s. 102. From this decision the plaintiff appealed to His Majesty in Council, and their Lordships held that the order of November 18, 1902, was a final decision on the case as to the recovery of the money paid, and that therefore it was not competent to the judge to dismiss that part of the case under the powers contained in s. 102. They therefore remitted the case to the Chief Court in order that the appeal to that Court, so far as it related to the recovery of the money paid, might be heard and decided on its merits.

The case having been thus remitted, the Chief Court rightly treated the appeal as an appeal from the order of November 18, 1902, dismissing the case with regard to the recovery of the money on the ground that the plaint contained no valid cause of action with respect thereto. After argument the Court decided in favour of the defendants, and dismissed the plaintiff's appeal with costs. From this decision the present appeal is brought.

The question raised by this appeal is therefore a pure point of law. Both the District Judge and the Chief Court have clearly stated that the decisions which they have given are based on the allegations in the plaint, and that for the purposes of such decisions these allegations must be taken to be true in fact. This is a necessary consequence of the nature of the plea, and the

same understanding must apply to the present judgment. In asking the Court to decide an issue like the present (which is essentially a demurrer by whatever name it may be called) the defendants must be taken to admit for the sake of argument that the allegations of the plaintiff in his plaint are true *modo et forma*. In so doing they reserve to themselves the right to shew that these allegations are wholly or partially false in the further stages of the action should the preliminary point be overruled, but so far as the decision on the preliminary point is concerned everything contained in the plaint must be taken to be true as stated.

That being so, it is only necessary to look at the plaint to see that according to English law the contention of the defendants is unsustainable. A wrongful interference with the plaintiff's lawful enjoyment of his own property is alleged. The plaintiff was clearly entitled to rid himself of that unlawful interference by any lawful means without thereby affecting his right to hold the defendants liable for that which they have thus caused him to do. It is true that paying under protest the sum demanded was not the only course open to him. He might have taken legal proceedings, by which, sooner or later, he might have rid himself of the interference. But to do so would have involved his submitting to the wrong for all the period necessary for those proceedings to be effective, and that might have been a serious aggravation of the wrong. To this he was in nowise bound to submit. He was free to choose a course which did not involve any such prolongation of the trespass. Accordingly he paid under protest the sum demanded, and under English law he was unquestionably entitled to demand a repayment of that sum because it was an involuntary payment produced by coercion, namely, the wrongful interference of the defendants with his full and free enjoyment of his own property. By English law it is not open to the wrongdoer to prescribe by which of two lawful alternatives the injured man puts a stop to the wrong under which he is suffering. His choice of any one alternative does not make it as between him and the wrongdoer a voluntary act or estop him from claiming that it was done under coercion.

The argument before their Lordships accordingly turned chiefly on contentions that the Indian statute law precluded

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the application in India of these well-known principles of English common law. These contentions were two in number. In the first place the respondents contended that in case the property of a stranger is seized under an attachment, the Code of Civil Procedure requires him to proceed under the group of sections commencing with s. 278 and that this is his only remedy. Their Lordships have no doubt that the procedure referred to is merely permissive. It is analogous to the procedure by interpleader which in England would be open in similar cases to parties owning the goods seized. But the fact that such a procedure is open to him if he chooses to adopt it interferes in no way with his right to take any other lawful alternative.

The main contention, however, was that the allegations in the plaint did not shew "coercion" according to Indian law. It was contended that nothing could be "coercion" under Indian law unless it satisfied the definition of "coercion" which is found in s. 15 of the Indian Contract Act, and that the allegations in the plaint failed so to do because they did not shew that the "unlawful detaining or threatening to detain" the property was "with the intention of causing any person to enter into an agreement." Their Lordships are of opinion that this argument is not sound and that it is based on a fundamental misunderstanding of the object and effect of s. 15 of the Indian Contract Act.

Sect. 15 forms part of a chapter which specially deals with the requisites of a valid contract. This chapter commences with s. 10, which may be regarded as the fundamental section, and which reads as follows: "All agreements are contracts if they are made by the free consent of parties competent to contract for a lawful consideration and with a lawful object and are not hereby expressly declared to be void."

The sections immediately following proceed to define the terms used in this fundamental section. Sects. 11 and 12 are devoted to the interpretation of the phrase "competent to contract." Sect. 13 deals with the term "consent." Sects. 14 to 18 deal with the phrase "free consent." In so doing s. 14 commences by defining when consent is said to be "free" and lays down that it is so when it is not caused by "coercion" as defined by s. 15, "or undue influence, fraud," &c. It will therefore be

seen that, s. 14 relates to "free consent" as an element in the making of contracts. It is natural, therefore, that when "coercion" comes to be defined in s. 15 for the purposes of s. 14 it is defined as follows: "Coercion is the committing or threatening to commit any act forbidden by the Indian Penal Code or the unlawful detaining or threatening to detain any property to the prejudice of any person whatever with the intention of causing any person to enter into an agreement."

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It is clear, therefore, that this definition of "coercion" is solely a definition which applies to the consideration whether there has been "free consent" to an agreement so as to render it a contract under s. 10. This explains why in the definition of "coercion" it is limited to an unlawful act done "with the intention of causing the person to enter into an agreement." But it would be to make nonsense of the statute if it were to be taken to mean that "coercion" in a legal sense could only exist if the object was to bring about a contract. Indeed such an interpretation would render the Act inconsistent with itself. Sect. 72, which is in Chap. V., which deals with "certain relations resembling those created by contract," reads as follows: "A person to whom money has been paid or anything delivered by mistake or under coercion must repay or return it," and Illustration (b) to that section reads as follows: "A railway company refuses to deliver up certain goods to the consignee except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive."

It is impossible to contend that the coercion referred to in this section or in the above illustration is "with the intention of causing any person to enter into an agreement." The word "coercion" must therefore be there used in its general and ordinary sense as an English word, and its meaning is not controlled by the definition in s. 15. That definition is expressly inserted for the special object of applying to s. 14, i.e., to define what is the criterion whether an agreement was made by means of a consent extorted by coercion and does not control the

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A further contention appears to have been put forward in the Court below to the effect that the plaintiff's only remedy was to proceed against the Delhi Cotton Mills Company, Limited, under ss. 69 and 70, in order to recover from them the money paid, seeing that they would have had the benefit of the payments in the satisfaction of the decree obtained against them. It is not a matter of surprise that this contention was not pressed before their Lordships. It is obviously unsustainable. Those clauses do not refer in any way to remedies against the wrongdoer and are therefore wholly irrelevant to the question in this appeal.

Their Lordships have thought it proper to deal specifically with the arguments raised on the hearing on account of the importance of the questions raised. But they are also of opinion that the matter is covered by authority. In the case of *Dooli Chand v. Ram Kishen Singh* (1) the circumstances were very similar to those in the present case, and on appeal to this Board their Lordships decided that money paid by the true owner to prevent the sale of his property under an execution could be recovered back.

In their judgment their Lordships say: "The objections taken to the action were that the payment was voluntary. It was made to prevent the sale which would otherwise inevitably have taken place of the mouzah which the respondents had purchased and was made therefore under compulsion of law; that is under force of these execution proceedings. In this country if the goods of a third person are seized by the sheriff and are about to be sold as the goods of the defendant and the true owner pays money to protect his goods and prevent the sale he may bring an action to recover back the money he has so paid; it is the compulsion under which they are about to be sold that makes the payment involuntary."

The respondents sought to distinguish the present case from the case just cited by contending that the sale in the present case was not inevitable. But it is evident that the greater or less probability of a sale taking place does not affect the ratio

(1) L. R. 8 Ind. Ap. 93.

decidendi of their Lordships in that case, which is that the payment was made under the force of the execution proceedings and that in India, as in England, such a payment is regarded by the law as being made under compulsion.

In their Lordships' opinion, therefore, the Chief Court ought to have given judgment in favour of the plaintiff in his appeal against the order of November 18, 1902. The consequence of such a decision would have been that the case would have gone back to the District Judge to be tried on the facts.

As has already been stated, the decision of this Board does not affect or prejudice any contention of either party with regard to the facts or any other contention of law not covered by the present judgment.

Their Lordships will therefore humbly advise His Majesty to allow the appeal and to remit the case to the Chief Court in order that the case may be sent to the District Judge to hear and determine. The respondents must pay all the costs of the second hearing before the Chief Court and the costs of this appeal.

Solicitors for appellant: *T. L. Wilson & Co.*

Solicitors for respondents: *Sanderson, Adkin, Lee & Eddis.*

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—

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Feb. 5, 6, 25. ---	DESAI NARSILAL CHATURBHUJDAS AND OTHERS	}	PLAINTIFFS.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Mortgage—Redemption—Limitation Act, 1877 (Act XV. of 1877), s. 19—Acknowledgment—Receipt in Collector's Book—Damdupat—Civil Procedure Code, 1882, s. 209—Discretion to allow Interest.

In 1793 a desai mortgaged with possession certain desaigiri dastur and pasaeta lands. In 1843 the persons in whom the mortgage rights were then vested received the desaigiri dastur from the Government. The payment was entered in the Collector's book, the recipients, through whom the appellants claimed, being described as the mortgagees of the desai. To this entry the recipients signed a receipt:—

Held, that this receipt was an acknowledgment.

Held, also, that the District Judge in disallowing interest after suit as contrary to the principle of damdupat must be taken to have exercised his discretion under s. 209 of the Civil Procedure Code, 1882.

APPEAL from a judgment and decree of the High Court (January 21, 1909) which affirmed, subject to a modification, a judgment and decree of the District Judge at Broach (March 12, 1906).

The main question in the appeal was whether the respondents' suit, commenced in 1901, to redeem a mortgage was barred by the Indian Statutes of Limitation.

The mortgage in question was executed on November 4, 1793, by Desai Partibrai Mujatrai, the predecessor in title of the respondents. The mortgagee was the predecessor in title of the appellants.

The desais were collectors of revenue under native rule. Their remuneration, called desaigiri dastur, consisted of a fixed sum together with a percentage of the revenue collected, and they also possessed lands in certain villages, which lands were called pasaeta (service) lands.

* *Present* : LORD SHAW OF DUNFERMLINE, LORD MOULTON, SIR JOHN EDGE, and MR. AMEER ALI.

By the mortgage deed Desai Partibrai Mujatrai mortgaged, with possession, his desaigiri dastur and pasaeta lands in the district of Broach. This mortgage was a consolidation of previously existing personal bonds and mortgages, under which there was a debt, part of which was upon personal security only. Under the terms of the deed the mortgagor covenanted to pay interest upon the personal debts, and in lieu of interest upon the mortgage debt the mortgagee accepted the rents and profits of the mortgaged premises. The mortgagor thereby further agreed that the repayment of the personal debt, which was not charged upon the lands, should be a condition precedent to redemption.

In 1803 the district of Broach finally came under British rule.

In or before 1831 it was resolved that persons entitled to desaigiri dastur and pasaeta rights should not collect it from the raiyats, but that an equivalent allowance should be paid to them from the Government treasury.

The mortgagees accordingly procured their names to be entered in the Collector's books as mortgagees under the mortgagee in question.

In 1843 the rights of the mortgagees were vested, in unequal shares, in two persons named Lalita Kuvar Lallubhai and Mansukhram Nandkishordas, and on June 8, 1843, the payment of the desaigiri watan allowance for the year ending May 1, 1843, was made to them by the Government. The Collector's books contained an entry of this payment. In the first column appeared the names of the recipients, described as "the under-mentioned mortgagees of Desai Partibrai Mujatrai"; in the second column appeared the amounts paid to the two recipients respectively; in the third column appeared the signatures of Lalita Kuvar Lallubhai and Mansukhram Nandkishordas.

In 1845, 1847, and 1849 there were similar entries and receipts by the two persons in whom, at those dates respectively, the mortgagees' rights were vested.

On October 16, 1901, the present suit to redeem the mortgage was instituted by the respondents in the Court of the Subordinate Judge of Broach, it being subsequently transferred to the District Judge.

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The appellants pleaded, inter alia, that the suit was barred by limitation under s. 13 of Bombay Regulation I. of 1800 and under the Indian Statutes of Limitation; they also claimed that they were entitled to receive as a condition precedent to redemption a sum which included interest on the amount of the personal debts at the rates specified from the date of the suit down to the actual redemption.

The respondents' reply was that the suit was within time by reason of acknowledgments made by persons through whom the appellants claimed, and that the appellants, under the rule of damdupat, were not entitled to recover as interest more than the amount of the principal debt. The District Judge held that the case was not barred by limitation; that Bombay Regulation I. of 1800 did not provide any period of limitation for a suit to redeem a mortgage; and that (in addition to other acknowledgments not material to this report) the signed receipts in the Government books for 1843, 1845, 1847, and 1849 were acknowledgments which, under the Indian Limitation Act, 1877 (XV. of 1877), s. 19, and art. 148 of Sched. II., were effectual to give a fresh period of limitation from those dates. He further held that the debt in respect of which the claim for interest arose was a personal debt to which the rule of damdupat applied, and he accordingly disallowed the appellants' claim to receive the interest. He did not by his judgment expressly state that in so doing he had exercised his discretion under s. 209 of the Civil Procedure Code, 1882. In the result he directed redemption upon payment of a specified sum. The High Court, upon appeal and cross-objections, affirmed the decision of the District Judge upon all points, except that that Court held that the appellants were entitled to be repaid certain sums which they had paid for local cess.

The High Court accordingly ordered that the decree of the District Judge should be affirmed with this modification.

De Gruyther, K.C., and *Dube*, for the appellants. The signatures of the receipts in the Collector's book did not amount to an acknowledgment of the mortgagor's right to redeem. They were merely receipts for the amounts stated, and cannot

be regarded as acknowledgments that the description of the recipients in the first column was accurate. Further, if the receipts amounted to an acknowledgment it was not an acknowledgment made to the person then entitled as mortgagor. The authorities shew that to be effectual an acknowledgment must be to the person to whom the liability exists : *Mylapore v. Yeo Kay* (1); *Fatimutilnissa Begam v. Soonder Das* (2); *Imam Ali v. Baij Nath Ram Sahu*. (3) The rule of damdupat does not apply as from the date of suit. The District Judge had a discretion under s. 209 of the Civil Procedure Code, 1882, to allow interest : *Maharajah of Bharatpur v. Ram Kanno Del* (4); *Dhondshet v. Ravji*. (5) It does not appear from the judgment of the District Judge that he exercised this discretion. He did not exercise it adversely to the appellants on account of any laches or improper conduct, because he ordered the mortgagors to pay the costs.

Parikh and *Alpaiwalla*, for the respondents, were not called upon to argue.

The judgment of their Lordships was delivered by

LORD MOULTON. This is an appeal from a judgment and decree dated January 21, 1909, of the High Court of Judicature of Bombay, which affirmed with a slight modification a judgment and decree of the Court of the District Judge of Broach, dated March 12, 1906. The main question is whether the present suit is barred by the Indian Statutes of Limitation. The Courts below have held that it is not so barred, and from this decision the appellants (who were defendants in the suit) appeal.

The facts of the case so far as they are relevant to the present appeal are very simple. The mortgage in question was executed on November 4, 1793. By that deed Desai Partibrai Mujatrai, the predecessor in title of the respondents, mortgaged with possession a certain desaigiri dastur and

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(1) (1887) L. R. 14 Ind. Ap. 168.

(2) (1900) L. R. 27 Ind. Ap. 103.

(3) (1906) I. L. R. 33 Calc. 613.

(4) (1900) L. R. 28 Ind. Ap. 35.

(5) (1896) I. L. R. 22 Bomb. 86.

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certain pasaeta lands situated in the district of Broach to the predecessor in title of the appellants. In 1803 the district of Broach finally came under British rule, and subsequently the desaigiri dastur in Broach was commuted into a money allowance, payable from the Treasury. Since that settlement the appellants have received the money allowance in lieu of the desaigiri dastur.

On October 16, 1901, the plaintiffs instituted the present suit for redemption of the said mortgage. The appellants pleaded that the suit was barred by limitation under the Indian Statutes of limitation, which provide a period of sixty years for a suit for redemption. Inasmuch as more than sixty years had elapsed since the execution of the original mortgage, this plea must have succeeded in the absence of written acknowledgments sufficient to satisfy the provisions of s. 19 of the Indian Limitation Act, 1877, but the plaintiffs contended that certain documents signed by the predecessors in title of the appellants constituted such acknowledgments and gave to the plaintiffs new periods of limitation, which brought the suit within the prescribed period.

It will suffice to examine one of such acknowledgments, namely, an entry in a receipt book relating to the payment on June 8, 1843, of the allowance which is above referred to in respect of the year ending May 1, 1843. The mortgagees of the desaigiri dastur had in ordinary course procured the entry of their names in the Collector's books as mortgagees under the mortgage in question, they being entitled to the payment of the annual allowance into which the original rights had been commuted. Consequently the payments of the periodical instalments of that allowance were regularly made to them as such mortgagees as they fell due. The rights of the mortgagees were at that time vested in somewhat unequal shares in two persons named respectively Lalita Kuvar Lallubhai and Mansukhram Nandkishordas. The entry in the book of the Government agent entrusted with the payment of the allowance states that the payment is made to "the undermentioned mortgagees of Desai Partibrai Mujatrai," and there follow the names of the two above-mentioned mortgagees. The amounts of the shares belonging to each of these

mortgagees are set against their names, and against these shares the mortgagees have in their own handwriting written their respective names in acknowledgment of the receipt of their shares. Their Lordships are of opinion that this is clearly an acknowledgment by them that they received these payments as being the parties interested in the original mortgage, and that their interest in the property was that of mortgagees thereunder. It follows, therefore, that this created a new period of limitation starting from June 8, 1843, and inasmuch as the present suit was instituted on October 16, 1901, it was brought within the prescribed period.

The only other point raised by the appellants on the hearing of this appeal related to the interest to be allowed on the redemption money for the period between the date of suit and the actual date of redemption. It was not contested that the rule of damdupat applied in the present case and that therefore the amount of arrears of interest to be allowed up to the date of suit was limited to an amount equal to the capital sum. By his decree the judge of first instance had given to the appellants no interest from the date of suit. The appellants admitted that it was discretionary whether he should grant any and what interest for that period, and that if he did exercise his discretion on the point they could not under the circumstances of the present case appeal against it. But they contended that the omission to give interest for that period had been by oversight. The only support for such contention was that in the judgment of that judge no reference was made to the point. On the hearing before the High Court that Court refused to accept that contention and treated the District Judge as having declined to award any interest for the period in question and held that it was a matter left to his discretion, and that under the circumstances of the case that discretion had not been unreasonably exercised. Their Lordships agree with this decision and the grounds on which it rests. No application was made to the District Judge to repair the alleged omission before the order was perfected, or at all; and, therefore, it must be taken that the order made by him represents in all respects his decision on the matter in plaint, and their Lordships see no reason to differ

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from the view of the High Court that the discretion was not unreasonably exercised.
Their Lordships will, therefore, humbly advise His Majesty that the appeal should be dismissed and that the appellants should pay the costs of this appeal.
Solicitor for appellants : *E. Dalgado.*
Solicitors for respondents : *T. L. Wilson & Co.*

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March 6.

LALA SONI RAM PLAINTIFF ;
AND
KANHAIYA LAL AND OTHERS DEFENDANTS.
ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Mortgage—Redemption—Limitation—Acknowledgment by Widow and Daughter of Mortgagee—Junction of Mortgagor and Mortgagee Interests—Effect of Acknowledgment—Limitation Act, 1859 (XIV. of 1859), s. 1, cl. 15—Limitation Act, 1877 (XV. of 1877), ss. 2, 19, and Sched. II., art. 148—General Clauses Act (I. of 1868), s. 6.

The appellant in 1907 instituted a suit for the redemption of a usufructuary mortgage made in 1842. In 1866 and 1867 the widow and daughter respectively of the mortgagee executed deeds of sale of the mortgagee interest which acknowledged the existence of the mortgage. For the period between 1883 and 1898 there was under these deeds of sale a junction of the mortgagor and mortgagee interests in one person. The defendants to the suit were the sons of the mortgagee's daughter above referred to :—

- Held, (1.) that the deeds of 1866 and 1867 were neither of them effectual acknowledgments within the Limitation Act, 1877, s. 19, since they were not made by a person “ through whom ” the defendants claimed title ;
(2.) that the statutory time continued to run during the period between 1883 and 1898 ;
(3.) that although the deeds of 1866 and 1867 would have been effectual acknowledgments within the Limitation Act, 1859, s. 1, clause 15, no title was thereby conferred, and the application of the Limitation Act, 1877, was not prevented by s. 2 of that Act or by the General Clauses Act 1868, s. 6.

APPEAL from a judgment and decree of the High Court (August 7, 1909) reversing a decree of the District Judge of

* Present : LORD SHAW OF DUNFERMLINE, LORD MOULTON, SIR JOHN EDGE, and MR. AMEER ALI.

Aligarh (March 24, 1908) which affirmed a judgment of the Subordinate Judge of Aligarh (September 16, 1909).

The sole question for determination in the appeal was whether the High Court was right in deciding that the appellant's suit for redemption of a mortgage was barred by limitation. The facts were not in dispute and may be stated as follows.

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On January 2, 1842, one Dalip Singh and his co-sharers in Mauza Kheria Buzurg executed in favour of Khushwakt Rai a deed of usufructuary mortgage over the whole twenty biswas of the mauza and put him into possession of it. By the terms of this mortgage the mortgagee was authorized to receive and retain the rents and profits in lieu of interest, except Rs. 80 which he undertook to pay annually to the mortgagor as malikana.

Prior to 1855 Khushwakt Rai, the mortgagee, died, leaving surviving him a widow and Musammat Jamna, who succeeded him, and a daughter, Musammat Janki.

On March 31, 1866, Musammat Jamna executed a deed of sale transferring one half of the mortgagee rights to Debi Parshad and Gulab Rai, and another deed hypothecating to those persons the other half. She died in 1866 and was succeeded by her daughter Musammat Janki, who in 1867 executed a deed of sale of this latter half to the same persons. In the deeds of 1866 and 1867 Jamna and Janki described themselves as mortgagees of the property and recognized the existence of the mortgage. Under these deeds Debi Parshad and Gulab Rai became in 1867 mortgagees in possession of the whole mauza.

Between 1880 and 1883 the mortgagor's rights in respect of a 13 biswas $7\frac{1}{2}$ biswansis share were acquired by the mortgagees. Under various further transfers the mortgagee rights over this share and the mortgagor rights over the whole mauza passed to Munna Lal, the father of the appellant. For the period from 1883 to 1898 Munna Lal and the appellant, who succeeded him, enjoyed the whole of the rents and profits accruing from this share of the mauza, including the malikana payable to the mortgagor under the mortgage deed of 1842. The remaining 6 biswas $7\frac{1}{2}$ biswansis share was afterwards redeemed, and no question relating thereto arose in the litigation.

Musammat Janki died in 1898 and was succeeded by her two

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sons (represented in this appeal by the respondents). In 1904 Musammat Janki's sons instituted a suit against the appellant to obtain possession as mortgagees of the 13 biswas $2\frac{1}{2}$ biswansis share, on the ground that the transfers made by Musammat Jamna and by Musammat Janki were only effectual during their lives, and claiming possession as reversionary heirs of Khushwakt Rai. It did not appear from the decree in that suit (the only part of the record before the Judicial Committee) that the plaintiffs therein alleged that the mortgagor rights vested in Mannu Lal or in the appellant, though they did state that "the property is now owned and possessed by the defendant" (the present appellant). In this suit Janki's sons obtained a decree for "possession of a 13 biswas $2\frac{1}{2}$ biswansis share held in mortgage." The result of this decree was to dissolve as from 1898 the union of the mortgagor and mortgagee rights which had existed since 1883, and to place the appellant and the sons of Janki in the relative positions of mortgagor and mortgagees of the 13 biswas $2\frac{1}{2}$ biswansis share of the mauza.

On March 4, 1907, the appellant commenced the present suit against Janki's sons (now represented by the respondents) praying for a decree for redemption. The defendants pleaded that the suit being filed more than sixty years after the date of the mortgage was barred by limitation. The Subordinate Judge of Aligarh held that the deeds of mortgage and sale executed by Musammat Jamna and Janki in 1866 and 1867 were acknowledgments of the mortgage, and he accordingly made a decree for redemption as prayed. This decision was affirmed by the District Judge.

The High Court (Banerji and Tudball JJ.) allowed the present respondents' appeal to that Court and dismissed the present appellant's suit. The purport and effect of the judgment of the High Court appear from the judgment of their Lordships.

Cave, K.C., and *Parikh*, for the appellant. There was between 1883 and 1898 a junction of the mortgagor and mortgagee rights in one person, the effect of which was that during that period the statute did not run. There was during those years

no person who could pay the principal money or the interest, or give or receive an acknowledgment of the mortgagor's right : *Burrell v. Earl of Egremont* (1) ; *Seagram v. Knight*. (2) It is true that s. 9 of the Limitation Act, 1877, provides that once the time has begun to run no subsequent disability or inability to sue stops it. This junction of the mortgagor and mortgagee interests was not a disability or inability within that section. If the period from 1883 to 1898 is left out, as it should be, the suit was brought within sixty years, the time provided by the Act. The High Court was wrong in holding that the deeds executed by Jamna and Janki in 1866 and 1867, which were admittedly sufficient in form, did not operate as acknowledgments under the Limitation Act, 1877, s. 19. A Hindu widow is not in the position of a tenant for life, but in that of an absolute owner with a restricted power of alienation. During her life she represents the estate : Mayne's Hindu Law and Usage, 6th ed., 1900, ch. xx., pars. 605, 625 ; *Katama Nachier v. Rajah of Sivagunga*. (3) The widow's acknowledgment is therefore binding upon the estate. In *Bagwanta v. Sukhi* (4), which was referred to in the judgment below, it was expressly stated that the position of a widow is on a different footing from that of other reversioners as she fully represents the estate. Further, the deeds of 1866 and 1867 were acknowledgments by persons "claiming under" the mortgagee, and were consequently good acknowledgments under the Limitation Act, 1859 (Act XIV. of 1859), s. 1, clause 15, which differs in language from the provision in the Limitation Act, 1877, s. 19. The appellant thereby acquired a new title or right to sue which was not affected by the latter Act, being preserved by s. 2 of that Act and by the General Clauses Act, 1868 (Act I. of 1868), s. 6. Lastly, in the suit brought by the respondents in 1904 they claimed possession of the estate as mortgagees and obtained a decree based upon their rights as mortgagees. That suit was brought more than sixty years after the date of the mortgage, and if the respondents' present contention is right they could then have claimed the estate as absolute owners. They are accordingly estopped in the present suit from resisting

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(1) (1843) 7 Beav. 205, at p 235.

(2) (1867) L. R. 2 Ch. 628.

(3) (1863) 9 Moo. Ind. Ap. 539.

(4) (1899) I. L. R. 22 Allah. 33.

- J. C. the right to redeem by the Code of Civil Procedure, 1882,
 1913 s. 13, Expl. II.
- LALA SONI RAM The respondents did not appear.
- v.
 KANHAIYA LAL. The judgment of their Lordships was delivered by
- 1913 SIR JOHN EDGE. The suit in which this appeal has arisen was
 March 6. brought on March 4, 1907, by Lala Soni Ram, the appellant
 — here, for the redemption of a mortgage which had been made on
 January 2, 1842, by the then owners of Mauza Kheria Buzurg
 in favour of Khushwakt Rai, who was on the making of the
 mortgage put in possession by the mortgagors. The mortgage
 was usufructuary, the profits (except Rs. 80 per annum) were to
 be taken by the mortgagee in lieu of interest, and the mortgagee
 was to pay to the mortgagors annually the Rs. 80 as malikana.

By the mortgage it was provided that the mortgagors should be entitled to redeem and to obtain possession of the mortgaged property on payment of Rs. 4,000, which was the amount advanced to them. No date for the redemption of the mortgage was specified, and consequently the mortgage became liable to be redeemed immediately after it was made. The whole 20 biswas of Kheria Buzurg were included in the mortgage, but the original mortgagors or some of them redeemed the mortgage so far as it affected 6 biswas 17½ biswansis of Kheria Buzurg, and this suit relates to the right to redeem the mortgage so far as it affects the remaining 13 biswas 2½ biswansis of the property which was mortgaged in 1842, if that right could at the date of the suit have been enforced by suit.

In order to understand the issues which were raised and were tried in the Court of first instance, and on appeal below, it is necessary briefly to refer to the title of Lala Soni Ram, the plaintiff-appellant, as representing the original mortgagors, and to the title of the defendants-respondents as representing the original mortgagee Khushwakt Rai, and to refer to a suit which was brought on May 18, 1904, by the present defendant-respondent Babu Charan Behari Lal and his brother Lala Shib Shankar Lal against the present plaintiff-appellant, Lala Soni Ram. Lala Shib Shankar Lal was a defendant to this suit and is represented here by the respondents to this appeal.

Between the years 1880 and 1883 Mannu Lal, since deceased, who was the father of the plaintiff-appellant, acquired the rights and interests of the original mortgagors in the 13 biswas $2\frac{1}{2}$ biswansis of Kheria Buzurg to which this suit relates. These rights and interests so far as they can be enforced are now vested in the plaintiff-appellant, Lala Soni Ram.

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Khushwakt Rai, the original mortgagee, died shortly before 1855, leaving surviving him his widow, Musammat Jamna, who died on May 10, 1866, and a daughter Musammat Janki, who died on May 30, 1898. Babu Charan Behari Lal and Lala Shib Shankar Lal, who were the plaintiffs in the suit of 1904, were the sons of Musammat Janki.

On March 31, 1866, Musammat Jamna, who had succeeded to a Hindu widow's estate on the death of her husband Khushwakt Rai, executed a sale deed by which she transferred a moiety of her interest as mortgagee of Kheria Buzurg to Debi Parshad and Gulab Rai, and on the same date by deed hypothecated to them the other moiety of her interest as mortgagee. On April 29, 1867, Musammat Janki executed a sale deed in favour of Debi Parshad and Gulab Rai, by which she transferred to them her interest as mortgagee in the moiety of Kheria Buzurg which had been hypothecated to them by Musammat Jamna in 1866. The mortgagee's interest in Kheria Buzurg which, by the sale deeds of 1866 and 1867, had vested for the lives of Musammat Jamna and Musammat Janki in Debi Parshad and Gulab Rai, vested by assignments in or before 1883 in Mannu Lal, and from 1883 until Musammat Janki's death in 1898 Mannu Lal or his son, Lala Soni Ram, the plaintiff-appellant, who succeeded him, enjoyed the rights of the mortgagors and the mortgagee in the 13 biswas $2\frac{1}{2}$ biswansis.

In the deeds of March 31, 1866, Musammat Jamna had described herself as a mortgagee and had acknowledged the existence of the mortgage of 1842, and in the deed of April 29, 1867, Musammat Janki had similarly described herself as mortgagee and acknowledged the existence of the mortgage. Neither of those deeds is before this Board, but that is the inference which their Lordships draw from the proceedings and the judgments in the Courts below.

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After the death of Musammat Janki her sons, Babu Charan Behari Lal and Lala Shib Shankar Lal, brought a suit on May 18 1904, against Lala Soni Ram, the present plaintiff-appellant, to obtain possession as mortgagees of the 13 biswas $2\frac{1}{2}$ biswansis of Kheria Buzurg on the ground that the transfers which were made in the lifetime of Musammat Jamna and Musammat Janki became ineffectual as against them on the death of those ladies. In that suit Babu Charan Behari Lal and Lala Shib Shankar Lal on October 12, 1904, obtained a decree for possession.

So far as appears from that part of the record which is before this Board, Babu Charan Behari Lal and Lala Shib Shankar Lal did not in the suit of 1904 allege or admit that the mortgagors' interest had vested in Mannu or was vested in Lala Soni Ram, the present plaintiff-appellant; their case apparently simply was that the title to the mortgagees' interest which had been transferred by Musammat Jamna and Musammat Janki had determined, so far as Lala Soni Ram was concerned, on the death of Musammat Janki, and that they became entitled as representing Khushwakt Rai, the mortgagee, on her death to possession as mortgagees. Their case was that, after the death of Musammat Janki, Lala Soni Ram was a trespasser, as in fact he was, and they claimed mesne profits. It does not appear that Babu Charan Behari Lal and Lala Shib Shankar Lal alleged, or otherwise admitted, in the suit of 1904, that a right to redeem the mortgage of 1842, which could be enforced by suit, was vested in any one, nor was it material to their cause of action that a right to redeem which could be enforced by suit should be vested in any one. Their title to possession on the death of Musammat Janki, which was the title they claimed, related back to and was based on the mortgage of 1842 whether the right to enforce by suit redemption of that mortgage had or had not been extinguished before May 18, 1902, by limitation. The mortgage had not been redeemed and nothing had happened between the death of Musammat Janki and May 18, 1904, to disentitle Babu Charan Behari Lal and Lala Shib Shankar Lal to a decree for possession based on that original title. As a matter of fact if Lala Soni Ram had desired on the death of Musammat Janki, in 1898, to redeem, he could have

brought his suit within sixty years from the date of the mortgage, as the sixty years did not expire until January, 1902, but apparently he hoped, by holding on to the possession of the 13 biswas $2\frac{1}{2}$ biswansis, to escape from having to pay the Rs. 4,000 redemption money. When the suit of 1904 was brought, the period of sixty years, computed from January 2, 1842, had expired.

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In this appeal, which is ex parte, the plaint and other pleadings in the suit of 1904 are not before their Lordships, but they draw the inference which they have expressed from the judgment of October 12, 1904, and from the judgments of the Courts below in this suit. The effect of the suit of 1904 was to give by process of law to Babu Charan Behari Lal and Lala Shib Shankar Lal the possession as mortgagees to which they had become entitled on the death of their mother Musammat Janki on May 30, 1898.

Lala Soni Ram, the present plaintiff-appellant, on March 4, 1907, brought in the Court of the Subordinate Judge of Aligarh this suit against Lala Shib Shankar Lal and Babu Charan Behari Lal for the redemption of the mortgage of January 2, 1842, so far as it affected the 13 biswas $2\frac{1}{2}$ biswansis of Kheria Buzurg. Other defendants were subsequently added. In their written statement Lala Shib Shankar Lal and Babu Charan Behari Lal admitted that the mortgage of January 2, 1842, was made, and so far as is now material pleaded that the suit was not brought within sixty years of the date of the mortgage, that no admission of the right of the mortgagor was made within sixty years from the date of the mortgage, and consequently that the suit was barred by limitation. They also alleged that in the suit of 1904 Lala Soni Ram had pleaded that he had a right to redeem, but that the Court in that suit had decreed their claim for possession, and they relied upon the Code of Civil Procedure, 1882, s. 13. They further pleaded that in the suit of 1904 it had been decided that the deeds which had been executed by Musammat Jamna and Musammat Janki were not binding upon them the answering defendants after the deaths of those ladies.

The Subordinate Judge held, and rightly as their Lordships consider, that the suit of 1904 did not by the operation of the Code of Civil Procedure, 1882, s. 13, bar the present suit. The

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suit of 1904 was a suit by Lala Shib Shankar Lal and Babu Charan Behari Lal for possession as mortgagees. The mortgage had not been redeemed and the plea of Lala Soni Ram that he was entitled to redeem was irrelevant to a suit by the usufructuary mortgagee for possession. Lala Soni Lal's title as mortgagor was not in question in that suit, nor could he as a defendant to that suit have converted that suit into one in which he could have obtained a decree for redemption. The Subordinate Judge, however, applying Act XIV. of 1859, s. 15, to the case, held that the acknowledgments of the existence of the mortgage by Musammat Jamna and Musammat Janki in their respective deeds brought this suit within time, and he gave the plaintiff a decree for redemption.

The District Judge of Aligarh, on appeal from the decree of the Subordinate Judge, affirmed the judgment of the Subordinate Judge, and by his decree of March 24, 1908, dismissed the appeal. From the decree of the District Judge the defendants appealed to the High Court at Allahabad. The High Court, rightly holding that the law of limitation applicable to a suit or proceeding is the law in force at the date of the institution of the suit or proceeding, unless there is a distinct provision to the contrary, held that Act XV. of 1877, and not Act XIV. of 1859, was the Limitation Act which was applicable to the suit. By Act XV. of 1877, s. 19, it is so far as is material for present purposes enacted as follows : "If, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he claims title or liability, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the acknowledgment was so signed."

This is a suit to redeem, and the period prescribed by Act XV. of 1877, Sched. II., art. 148, within which a suit against a mortgagee to redeem or to recover possession of immovable property mortgaged is sixty years from the time when the right to redeem or to recover possession accrues.

The learned judges of the High Court held that there could not be any doubt that the mortgage of 1842 was in terms admitted by Musammat Jamna and Musammat Janki in their respective deeds, but they also held that the defendants derived title through their grandfather Khushwakt Rai, who was mortgagee and the last full owner of the rights of the mortgagee, and did not derive title through Musammat Jamna or Musammat Janki, who, although for certain purposes they did represent the estate, were not persons who could be deemed to have admitted for the benefit of the mortgagee's estate a right of redemption in the mortgagor, and that in making such acknowledgments they had no power to bind any interests except their own. To have held otherwise would, in their Lordships' opinion, have been to extend the power of a Hindu woman in possession for her limited interest to bind the estate to an extent which has not been sanctioned by authority.

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It was also contended in the High Court on behalf of the plaintiff that there had been a fusion of the interests of the mortgagee and the mortgagor in the same person between the years 1883 and 1898, and that no mortgage was in existence during that period; and that art. 120 and not art. 148 of Sched. II. of Act XV. of 1877 applied, and that the suit was within time. The learned judges of the High Court pointed out one obvious answer to that contention. It was that, if art. 120 applied, the suit was not within time, as Musammat Janki had died more than six years before the suit was brought. They also pointed out that the mortgagee's interest which became vested in Mannu was only the limited interest of a Hindu lady, and consequently there had been no merger. The High Court, by its decree of August 7, 1909, allowed the appeal on the ground that the suit was barred by limitation and dismissed the suit with costs in all Courts. From that decree the plaintiff Lala Soni Ram has brought this appeal.

In this appeal it has been contended that the Limitation Act applicable to this case is Act XIV. of 1859, and consequently the acknowledgments of the existence of the mortgage of 1842 which were contained in the deeds which were executed by Musammat Jamna and Musammat Janki brought this suit

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within time. As to that contention it is sufficient for their Lordships to say that they agree with the High Court that Act XIV. of 1859 does not apply to this suit and that the Limitation Act which does apply is Act XV. of 1877, and further that the acknowledgments which were made by Musammat Jamna and Musammat Janki were not acknowledgments within the meaning of s. 19 of Act XV. of 1877 made by a person or persons through whom the defendants derived title or liability. Their Lordships consequently consider that these acknowledgments were ineffectual to give a new period of limitation. The contention in this appeal which is based upon the General Clauses Act, 1868, s. 6, and the Limitation Act, 1877, s. 2, was pressed upon the High Court. Their Lordships agree with the High Court that an acknowledgment of liability only extends the period of limitation within which a suit must be brought and does not confer title, and is not a "thing done" within the meaning of s. 6 of the General Clauses Act.

In this appeal it was also contended that the operation of Act XV. of 1877 was suspended during the whole period 1883—1898 when Mannu or his son Lala Soni Ram, the plaintiff, were in the position of mortgagors and mortgagees, the contention being that that period should be excluded from the computation of the sixty years provided by Act XV. of 1877, Sched. II., art. 148, as between 1883 and 1898 no suit for redemption could have been brought by Mannu or after his death by the plaintiff Lala Soni Ram. Their Lordships are by no means certain that this particular contention was raised in the High Court; the contention there apparently was, not that the operation of art. 148 was suspended during the period 1883—1898, but that by reason of the fusion of the interests of mortgagor and mortgagee art. 148 did not apply to this case and that the article which did apply was art. 120. In support of the contention in this appeal this Board was urged to apply in this suit the principle which Lord Langdale M.R. applied when construing s. 40 of 3 & 4 Will. 4, c. 27, in *Burrell v. Earl of Egremont*. (1) Their Lordships are unable to accede to that contention, as art. 148 of Act XV. of 1877 is essentially

different in its language and intention from s. 40 of 3 & 4 Will. 4, c. 27, and the facts upon which Lord Langdale acted were not in any way similar to the facts in this suit. Under s. 40 of 3 & 4 Will. 4, c. 27, no suit could be brought to recover money secured on a mortgage or otherwise charged upon land, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or a release of the same, unless in one or other of the events specified in the section. The sixty years' period of limitation allowed by Act XV. of 1877, Sched. II., art. 148, begins to run in such a case as this "when the right to redeem or to recover possession accrues." In *Burrell v. Earl of Egremont* (1) there was a charge upon an estate which no assignable person was liable to pay and in respect of which no person was capable of making an acknowledgment that it was due. In this case the right to redeem the mortgage of January 2, 1842, accrued to the mortgagors the moment the mortgage was executed, and the sixty years' period of limitation must be computed as having begun on January 3, 1842. There is nothing in Act XV. of 1877 which would justify this Board in holding that, once that period of limitation had begun to run in this case, it could be suspended. Their Lordships consider that if they were to hold that, by reason of the fusion of interests between 1883 and 1898, the period of limitation was suspended, they would—this not being a suit to which the proviso to s. 9 of Act XV. of 1877 applies—be deciding contrary to the express enactment of that section that "when once time has begun to run, no subsequent disability or inability to sue stops it."

At the hearing of this appeal two other contentions, each of which involved the consideration of facts and of law as applied to those facts, were raised. Neither of those contentions, so far as appears from the record which is before this Board, had previously been raised by any one at any stage of this suit either in the Court of first instance or on either of the appeals, and consequently had not been considered either by the Subordinate Judge, or the District Judge, or the learned judges of the High Court. Further,

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neither of these contentions is even suggested by any of the grounds of appeal which were set out in Lala Soni Ram's application to the High Court for leave to appeal to His Majesty in Council, nor is either of them suggested in the reasons contained in the case for the appellant here, and it must be remembered that this appeal has been heard *ex parte*, neither the respondents nor any counsel on their behalf having appeared. Their Lordships are not disposed to depart from the established practice of this Board not to allow on appeals to His Majesty in Council new cases to be made which were not made below.

The result is that their Lordships will humbly advise His Majesty that this appeal should be dismissed, and the decree of the High Court should be affirmed.

Solicitor for appellant : *Edward Dalgado*.

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BASANT SINGH DEFENDANT ;
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CONSOLIDATED APPEALS.

ON APPEAL FROM THE COURT OF THE JUDICIAL
COMMISSIONER AT OUDH.

Agreement to finance intended Litigation—Construction—No present Interest in Property—No Right to sue—Defect on Face of Party's Title—Practice—Point not raised in Court appealed from.

The respondent entered into agreements with the proposed plaintiffs in two intended suits to recover possession of certain shares in five villages. The agreements provided (1.) that the respondent would be a co-sharer with the respective plaintiffs ; (2.) that he would finance the litigation ; (3.) that, in the event of success, he would be entitled to proprietary possession of the share stipulated for. The suits were accordingly commenced, the respondent being joined as a plaintiff. In each suit the plaintiffs other than the respondent entered into a compromise whereby their claim was dismissed, and the respondent continued the litigation alone. The question of the competence of the respondent

* *Present* : LORD ATKINSON, LORD MOULTON, SIR JOHN EDGE, and MR. AMEER ALI.

to join in or to continue the suit, though raised in the earlier stages of the litigation, was not relied on or discussed in the Court appealed from; it was, however, specifically raised in the appellant's case upon the appeals to His Majesty in Council :—

Held, that the agreements conferred on the respondent no then present right in the property in suit and that he was consequently not competent to join in bringing or to continue the litigation.

Held, also, that, this being a defect upon the face of the documents upon which the respondent's case as plaintiff rested, the appeals should be allowed although the point had not been fully raised in the Court appealed from.

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CONSOLIDATED APPEALS, between the same parties, from three judgments and decrees of the Court of the Judicial Commissioner (dated as to the first March 19, 1909, and as to the second and third March 29, 1911), the first decree in part affirming and in part reversing a decree of the Subordinate Judge of Partabgarh, the second and third in part affirming and in part reversing a decree of the District Judge of Rae Bareilly.

Under circumstances appearing from the judgment two suits were commenced on August 10, 1907, in the Court of the Subordinate Judge of Partabgarh. In the first suit (No. 548 of 1907) Sheopal Singh, Bhukhan Singh, and Mahabir Pershad (the respondent) were plaintiffs, and Basant Singh (the appellant), Binda Sewak Singh, and Ram Pershad were defendants. In the second suit (No. 549 of 1907) Bhopal Singh and Mahabir Pershad (the respondent) were plaintiffs, and Ram Pershad and other were defendants. Each suit was to recover possession with mesne profits of a certain share in five villages in the Partabgarh district and arose out of transactions by the managers of two Hindu joint families to which the villages belonged in unequal shares. On April 25, 1907, before either suit was commenced, the respondent Mahabir Pershad, who was joined as a plaintiff in both suits, had entered into two agreements with his joint plaintiffs in the respective suits. These agreements were in the same form, which is fully set out in the judgment, and provided shortly as follows :—

1. That in the share of each co-plaintiff "Mahabir Pershad will be co-sharer of one half share."

2. (a) That Mahabir Pershad would bear the entire expense of the litigation.

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(b) " That in the event of success Mahabir Pershad will be entitled to proprietary possession of the share entered in clause (1.)."

Save in so far as he had an interest under these agreements the respondent had no interest proprietary or otherwise in the property in suit. In each suit the defendants by their written statements pleaded, *inter alia*, that the respondent Mahabir Pershad had, under the agreement with his co-plaintiffs, no interest in the property, and issues were settled on this defence. In suit No. 548, on April 22, 1908, there was filed under the Code of Civil Procedure, 1882, s. 375, a compromise made between the defendant Basant Singh (the present appellant) and the plaintiffs other than Mahabir Pershad (the respondent) whereby those plaintiffs agreed that their claim in that action should be dismissed. Both suits were heard together on July 7, 13, and 18, and on July 22, 1908, the Subordinate Judge delivered separate judgments. In suit No. 548 he treated the matter as though the compromise (which was then disputed) had not been made ; he held that under the first clause of the agreement of April 25, 1907, the respondent had an existing interest in the property, but upon other grounds he dismissed the suit.

In his judgment in suit No. 549 the Subordinate Judge did not deal with the position of the respondent under the agreement of April 25, 1907, but he dismissed the suit upon other grounds. The subsequent course of the litigation was as follows :—

Suit No. 548 : Against the decree of the Subordinate Judge two only of the plaintiffs, namely, Sheopal Singh and the present respondent, appealed to the Court of the Judicial Commissioner at Oudh. The learned Judicial Commissioner by his judgment delivered on March 19, 1909, held that the claim of Sheopal Singh was concluded by the compromise of April 22, 1908 ; he agreed with the judgment of the Subordinate Judge that under the agreement of April 25, 1907, Mahabir Pershad (the present respondent) acquired a present interest in the property, and as he decided the other questions raised in the appeal partly in accordance with the plaintiffs' contentions, he made a decree in favour of Mahabir Pershad (the present respondent). This decree is the subject-matter of the first of the consolidated appeals.

Suit No. 549: Against the decree of the Subordinate Judge the plaintiffs appealed to the District Judge of Rae Bareilly, as the valuation of this suit was under Rs. 5,000. The District Judge, following the decision of the Judicial Commissioner in suit No. 548, on May 12, 1909, remanded the suit to the Subordinate Judge, who on August 3, 1909, also following the judgment of the Judicial Commissioner, made a decree partly in favour of the defendant and partly in favour of the plaintiffs, including the respondent. Against this decree both parties appealed to the District Judge at Rae Bareilly. The plaintiff Bhopal Singh on October 8, 1909, entered into a deed of compromise with the defendant Basant Singh (the present appellant) under which Bhopal Singh agreed upon terms that his claim in that action and his appeal should be dismissed. Thus Mahabir Pershad (the respondent) was left to prosecute the appeal alone. The District Judge agreed with the Subordinate Judge and dismissed both appeals. Against this decree both parties appealed to the Court of the Judicial Commissioner at Oudh. The appeals were referred to a Division Bench of two judges, who on March 29, 1911, delivered judgment therein and made two decrees, the one allowing the appeal of the present respondent and the other dismissing the appeal of the present appellant. These decrees were the subject-matter of the second and third of the present consolidated appeals. The present appellant did not in suit No. 549 in his grounds of appeal either to the District Judge or to the Court of the Judicial Commissioner raise any question as to the competency of the respondent to join in the suit or to continue it alone. The point was not alluded to in the judgment of the District Judge or in the judgments in the Court of the Judicial Commissioner in this suit, and it was not raised by the appellant in either of his petitions to appeal to His Majesty in Council. The appellant, however, in his printed case in the present appeals specifically stated as follows: "The main questions for determination on the present appeals are whether the respondent alone was competent to carry on the litigation, and" Among the reasons submitted in the appellant's case were the following:—"(1.) Because the respondent's suit was a mere gambling in litigation, and he was not competent to

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De Gruyther, K.C., and Dube, for the appellant. Under the agreement of April 25, 1907, the respondent acquired no present interest in the property in suit. It was merely an agreement operative in the event of the suit succeeding. The respondent had under it no rights which entitled him either to join as a plaintiff or to continue the litigation after the other plaintiffs had compromised their claims. The decision in *Lal Achal Ram v. Raja Kazim Hussain Khan* (1) is distinguishable, for it was held that the instrument in question in that case conferred a present interest in the property.

Lowndes, for the respondent. By clause (1.) of the agreement a present interest is conveyed. The word “will” refers only to the getting of possession and does not mean that the proprietary right is intended to be in futuro. The judgment of the Subordinate Judge in suit No. 548, confirmed by the judgment of the Judicial Commissioner, meant that by the proper construction of the agreement, which was in the vernacular, it conveyed a present interest. In any case the respondent was in the position of an equitable assignee and was entitled in equity to be joined as a plaintiff and to continue the suits in the name of the other plaintiffs. Except by the original defences and at the hearing of the appeal in suit No. 548 in March, 1909, the appellant never raised the question until he presented his case in these appeals, and it is too late to raise it now.

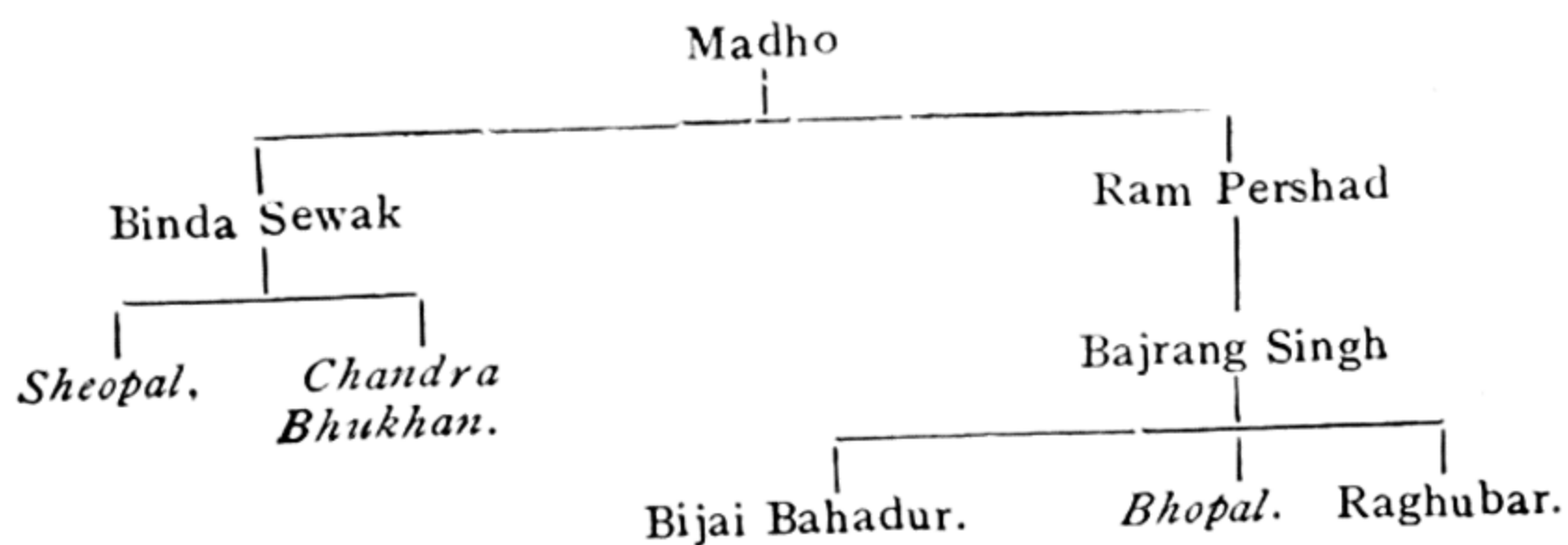
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The judgment of their Lordships was delivered by
 LORD ATKINSON. These are three consolidated appeals from three decrees of the Court of the Judicial Commissioner of Oudh, the first dated March 19, 1909, and the other two March 29, 1911. By the first of these, certain decrees of the Subordinate Judge of Partabgarh, dated July 22, 1908, were in part affirmed and in part reversed, and by the two latter a judgment and decree of the District Judge of Rae Bareli, dated February 5,

(1) (1905) L. R. 32 Ind. Ap. 113.

1910, was also in part affirmed and in part reversed. By this decree of February 5, 1910, a previous decree of the same Subordinate Judge, dated August 3, 1909, was in part affirmed and in part reversed.

The facts out of which all this litigation has arisen are shortly as follows:—A certain estate in five villages in the Partabgarh district was owned by two joint Hindu families, the respective heads of which were two brothers Binda Sewak and Ram Pershad, the share of the said Binda Sewak's branch being 7 annas 2 pies and that of Ram Pershad's branch 8 annas 10 pies. A genealogical table set out in the respondent's case, the accuracy of which is not disputed, shews of what members these two families were composed:—



The persons whose names are printed in italics are plaintiffs in the two suits, numbered 548 and 549 of 1907, in which the decrees appealed from were respectively made, namely, *Sheopal Singh* and *Chandra Bhukhan Singh* in the first, and *Bhopal Singh* in the second. In each of these suits one Mahabir Pershad, not a member of either family, but claiming an interest in portions of the joint family property under certain agreements, was joined as a plaintiff.

By two deeds, dated respectively January 2, 1900, and October 3, 1901, Binda Sewak purported to sell to Basant Singh (the appellant) his share of the joint family property. Thereupon Ram Pershad, as co-sharer in the family estate, instituted two pre-emption suits in respect of these two sales, and obtained decrees therein. He subsequently, by deeds dated June 4, 1903, and August 3, 1903, respectively, purported to sell and convey to the same Basant Singh (the appellant) the share of the property the right to which he had thus acquired by pre-emption, together with all but a 6 annas share of his own

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share of the family property. In addition he, by deed dated February 4, 1907, mortgaged this latter 6 annas share to the same Basant Singh to secure a sum of Rs. 12,000. The mortgage was a possessory mortgage for a period of twenty-five years. Sheopal Singh, Chandra Bhukhan Singh, and Bhopal Singh determined to impeach all these dealings with the joint family properties as being, on several grounds, void according to Hindu law, but they had no money to meet the cost of litigation. Two agreements, both dated April 25, 1907, were accordingly entered into between them and Mahabir Pershad, the one by Sheopal Singh and Chandra Bhukhan Singh jointly and the other by Bhopal Singh. They are practically identical in terms. They provided that Mahabir Pershad should in each case finance the contemplated litigation on certain terms to be presently considered in detail.

Two actions were accordingly instituted in the Court of the Subordinate Judge of Partabgarh, the first on August 10, 1907, in which Sheopal Singh, Bhukhan Singh, and Mahabir Pershad were plaintiffs, and Basant Singh, Binda Sewak Singh, and Ram Pershad defendants, praying for "a decree for proprietary and actual possession of 4 annas 9 pies 6 $\frac{2}{3}$ karants under proprietary share" in five villages therein named and for Rs. 1,704.14.9 $\frac{98}{96}$ mesne profits. In other words, it was an action of ejectment and for recovery of mesne rates. In the second suit Bhopal Singh and Mahabir Pershad were plaintiffs, and Basant Singh, Ram Pershad, and his grandsons Bijai Bahadur Singh and Raghubar Singh defendants. The relief claimed was similar, namely, to recover possession of one-sixth of the property conveyed away by Ram Pershad by the three deeds already mentioned.

In both suits a plea was filed to the effect that Mahabir Pershad was not entitled to recover possession. That point was thus distinctly raised. Both suits were contested, and both heard together.

The principal defendant in the first suit, by deed dated April 22, 1908, compromised with the two principal plaintiffs in that suit, namely, Sheopal Singh and Chandra Bhukhan. The deed provided, amongst other things, that the claim of these plaintiffs to recover the possession of the lands mentioned should be

dismissed, and their claim for mesne profits rejected. This deed was filed in Court under s. 375 of the Code of Civil Procedure, 1882, and the suit was dismissed as against these plaintiffs. A similar compromise was entered into in the second suit with Bhopal Singh, and that suit was also dismissed as against him. Mahabir Pershad thus became the sole plaintiff in both suits. His claim to recover the possession of the shares of the property mentioned in them respectively thus rests entirely upon the agreements he so entered into with these plaintiff's. Even if all the impeached deeds were absolutely void he would not be entitled to the relief he claims unless these agreements conferred upon him a right to recover possession of the undivided shares of these villages of which he seeks to recover the possession. The agreements thus become the foundation of his title. Until their true construction and the nature of the rights they confer have been determined, it is irrelevant to consider the question of the validity or invalidity of the deeds. The other is the preliminary question, and it has not only been raised, but actually ruled upon by the Subordinate Judge in his judgment delivered upon July 22, 1908. In the last paragraph but one of this he, when dealing with the seventh issue, said, "The suit, however, cannot fail altogether, as was contended by defendant 1. Plaintiff 3 has acquired an interest as to half the property." This seventh issue ran thus: "To what relief, if any, are the plaintiffs entitled?" Owing to the compromise that issue came to mean, to what relief is the third plaintiff, Mahabir Pershad, entitled? And the last of the reasons stated in the appellant's case lodged in these appeals is that the respondent, Mahabir Pershad, is "not entitled to possession of the property in suit or to any other relief." It may well be that this question, though it had been raised, was not discussed on the hearing of both the appeals before the Court of the Judicial Commissioner, but since the point arises on the very face of the documents on which the plaintiff's case is founded, their Lordships think they are bound to decide it. It would be quite impossible for them to advise His Majesty to grant to a litigant relief to which they were of opinion he was not entitled, simply because those concerned for the parties in the cause abstained

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from discussing in the Court from which the appeal to His Majesty had been taken a vital point plainly appearing on the very face of his written proofs, and plainly raised as this point has been in this case.

As the two agreements are practically identical in terms, it will be sufficient to consider one of them. It is elementary law that a plaintiff in an action of ejectment must recover by the strength of his own title, not by the weakness of his adversary's. What may be the rights or interests, if any, which the plaintiff may have under these agreements in the subject-matter of the suit are irrelevant considerations if he has not a right to the possession he seeks to recover. The primary question for decision, therefore, is, Did the agreement in the first action confer upon Mahabir Pershad at the time that action was instituted a then present right to that possession? There is no suggestion that if he had not the right then he has since acquired it.

The provisions of the agreement setting forth the conditions upon which it was entered into, relevant on this point, run as follows :

“ 1. That in the share of each declarant amounting to 2 annas 4 pies and $13\frac{1}{3}$ karant, Mahabir Pershad *will be a co-sharer of one-half share*, and the remaining one-half share will belong to us, the declarants, as follows :

Sheopal Singh - 2 annas 4 pies $13\frac{1}{3}$ rd karant share.

Chandra Bhukhan

Singh . . 2 „ 4 „ $13\frac{1}{3}$ rd „ „

“2. We, the declarants, and Mahabir Pershad, will be bound by the following conditions :—

“ (a) That Mahabir Pershad will bear the entire expenses in connection with the suit from the original Court to the Court of Appeal from his own pocket in the way he pleases, and if the opposite party prefer any appeal then Mahabir Pershad will have to defend the appeal also with his own costs.

“ (b) That in case of success Mahabir Pershad will be entitled to *proprietary possession of the share entered in para. 1 of this document or one-half of the share which may be decreed*, and it will be at the pleasure of

Mahabir Pershad either to keep his share joint or to have it partitioned. But during the period of jointness he will have all rights of making collections and management of the zemindari share decreed.

“(c) That Mahabir Pershad will remain a co-sharer and proprietor like ourselves in all the sir and khudkasht lands and all zemindari rights relating to the zemindari share like ourselves, and we will have no right to keep separate possession over any sir and khudkasht land, nor will we raise any plea as to exproprietary right.”

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In the view of their Lordships these provisions did not confer upon Mahabir Pershad a then present right to the possession of any share in the property the subject-matter of the suit. That right would arise, if at all, only when success in the contemplated litigation had been achieved. Success has not been achieved. By the agreement it was contracted that up to that time, at all events, he, Mahabir Pershad, should merely be a partner or co-owner with his co-plaintiffs in a certain undivided fraction of the property mentioned in the first of its paragraphs. There was no present grant or assignment to him of any separate share or fraction of the property divided or undivided. At best the contract only amounted to this, that in a certain future event he should become entitled to the proprietary possession of a certain undivided fraction of it, and then have the right to have that fraction partitioned.

The case of *Lal Achal Ram v. Raja Kazim Hussain Khan* (1) is wholly different from the present. There the sole owner of certain lands, who had already sold one half of them, executed a deed of sale in which it was set forth that “he has sold half the estate to the Raja for a lakh and a half of rupees.” He acknowledged the receipt of one lakh; the balance had to be paid on the termination of certain litigation, which the Raja was to conduct at his own expense. The statement of the amount of the consideration was no doubt exaggerated. But the vendor never impeached his deed as not being a valid transfer of the property. On the contrary he had more than once affirmed it, urged the

(1) L. R. 32 Ind. Ap. 113.

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Raja to take proceedings founded upon it, and continued to receive payments due to himself under it. The terms of the instrument are not set out at length in the report of the case, but Lord Macnaghten in delivering the judgment of the Board, after dealing with all the facts and quoting from the deed the passage already mentioned, says at p. 121 of the report : " Their Lordships agree with the judgment of the Court of the Judicial Commissioner that the transaction was a present transfer by Ardawan (the sole owner) of one moiety of his interest in the estate giving a good title to the Raja on which it was competent for him to sue." The case cannot be relied upon as a guide to the true construction of the agreements in the present case.

On that construction their Lordships are clearly of opinion that neither agreement by its terms confers upon the respondent Mahabir Pershad any present right to recover the possession of the share of the property mentioned in it which he claims to recover. They accordingly think that these appeals should be allowed ; that the three judgments and decrees of the Court of the Judicial Commissioner, dated March 19, 1909, and March 28, 1911, respectively, should be set aside ; that the two judgments and decrees of the lower Courts, namely, that dated August 3, 1909, of the Subordinate Judge, and that of the District Judge of Rae Bareli, dated February 5, 1910, should also be set aside ; and that both the suits should be dismissed with costs, and they will humbly advise His Majesty accordingly. The respondent must pay the costs of these consolidated appeals.

Solicitors for appellant : *Barrow, Rogers & Nevill.*

Solicitors for respondent : *Watkins & Hunter.*

MOHAN LALJI AND ANOTHER PLAINTIFFS ;
 AND
 GORDHAN LALJI MAHARAJ AND OTHERS . DEFENDANTS.

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Feb. 13 ;
March 17.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Sebaitship—Succession—Absence of Evidence of Custom—Ordinary Hindu Law—Plaintiffs not competent to perform Rites.

In a suit in which the appellants claimed the sebaitship of a temple of the Ballavacharya Gosains, of which the first respondent was in possession as sebait :—

Held, that the rule laid down in *Gossamee Sree Greedhareejee v. Ruman-lolljee Gossamee* (1889) L. R. 16 Ind. Ap. 137, that “when the worship of a thakoor has been founded, the sebaitship is held to be vested in the heirs of the founder, in default of evidence that he has disposed of it otherwise or of there being some evidence of usage, course of dealing, or some circumstances to shew a different mode of devolution,” cannot be applied so as to vest the sebaitship in persons who, according to the usages of the worship, cannot perform the rites of the office.

APPEAL from a judgment and decree of the High Court (February 28, 1910) affirming a judgment and decree of the judge of the Small Cause Court of Agra, exercising the power of a Subordinate Judge (August 5, 1907).

The appellants were the sons of a daughter, named Ganga Betiji, of one Goswami Muttuji Maharaj (hereinafter called Muttuji). On July 7, 1904, the appellants brought the present suit against the respondents other than Gordhan Lalji, claiming joint possession of a temple and its appurtenances. The temple in question was situated in a village called Jatipura, in the Muttra District, and belonged to the Ballavacharya Gosains, a Hindu sect the history of which is stated in the judgment of their Lordships. The original defendants were the sons of another daughter of Muttuji, named Gordhana Betiji. The appellants in their plaint alleged that Muttuji was owner of the temple together with its appurtenances, that his widow and his daughters in succession owned and enjoyed the profits of the temple according to the ordinary rules of inheritance of the

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Mitakshara law, and that upon the death of the last surviving daughter the plaintiffs were entitled to joint possession with the defendants. Before the date of the commencement of the suit Tikait Gordhan Lalji, the first respondent, had brought a suit against the other respondents, claiming to succeed to the seabaitship of the temple under the customary law regulating the succession to temples of the Ballavacharya Gosain sect and to recover possession of the temple and its appurtenances. This suit was referred to arbitrators, who by their award dated July 28, 1905, decided in favour of Gordhan Lalji. He thereupon was put into possession of the temple and its appurtenances, and he then applied to the Court to be, and was, joined as a defendant in the present suit. No amendment of the plaint was made, but the High Court subsequently allowed the appellants to amend the prayer of the plaint by adding thereto the words “ and that the defendant Tikait Gordhan Lalji may be ejected.” The respondents other than Gordhan Lalji filed written statements but took no further part in the proceedings. Gordhan Lalji by his written statement pleaded, *inter alia*, that the temple together with its appurtenances was debottar property; that succession to the office of a seabait of the said temple was not governed by the ordinary rules of the Hindu law, but by special usage or custom of the Ballav Kul, under which a Ballavacharya Gosain alone could succeed; and that in any case the plaintiffs being Bhats were incompetent to perform the religious duties of a seabait of the temple and could not succeed to the property in dispute.

The first Court framed issues for trial and on August 5, 1907, delivered judgment dismissing the suit. The findings of the first Court on the issues included the following :—that, in regard to temples and properties appertaining thereto, under a custom prevailing in the Ballav Kul, the male kinsmen of the founder, or last holder, exclude the sons of daughters, and that the respondent Gordhan Lalji was entitled to possession under a custom recorded in the *wajib-ul-arz* of the village.

The appellants appealed to the High Court and at the hearing it was admitted, as was found by the Subordinate Judge, that the property was debottar, but it was contended on the

appellants' behalf that they were entitled, jointly with the respondents other than Gordhan Lalji, to succeed to the management of the temple and the temple property, according to the ordinary Hindu law of inheritance. The High Court (Richards and Tudball JJ.) dismissed the appeal. By their judgment (reported I. L. R. 32 Allah. 461) they held that under the circumstances of the case the onus did not lie upon the defendant Gordhan Lalji to prove a universal custom excluding daughters' sons, and that it would be improper to establish in the gaddi persons who, as was admitted by the plaintiffs' witnesses, could not properly perform the office. They considered that the evidence established that whatever might be the custom or usage of the sect as to succession, the ordinary rule of inheritance under Hindu law did not apply and that the plaintiffs had failed to establish a custom in their favour. They concluded that the burden of proof being on the plaintiffs they had failed to discharge it.

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De Gruyther, K.C., and Ross, K.C., for the appellants. The appellants claim as successors to Muttuji according to the ordinary rule of Hindu law, under which the possession vested in turn in his widow and his two daughters. It is true that they have not proved a custom of the Ballav Kul under which the sebaiship vests in the sons of daughters, but the onus was on those who were seeking to shew that the ordinary Hindu law of succession did not apply: *Gossamee Sree Greedhareejee v. Rumanlolljee Gossamee*. (1) The respondents did not discharge that onus. What is set up by the evidence is really a family custom and not a custom applicable to a religious sect. The decisions in *Greedharee Doss v. Nundkishore Doss* (2), *Rajah Muttu Ramalinga Setupati v. Perianayagum Pillai* (3), *Srimati Janoki Debi v. Sri Gopal Acharjia* (4), and *Genda Puri v. Chatar Puri* (5) apply only to religious brotherhoods and the principles there laid down are not applicable to the present case. Even assuming that the appellants are not competent to perform the rites and services

(1) L. R. 16 Ind. Ap. 137.

(2) (1867) 11 Moo. Ind. Ap. 405.

(3) (1874) L. R. 1 Ind. Ap. 209,

at p. 228.

(4) (1882) L. R. 10 Ind. Ap. 32.

(5) (1886) L. R. 13 Ind. Ap. 100.

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of the temple, that does not prevent them from holding the sebaiship and arranging for the proper performance of the worship, as must have been done during the time of Muttuji's widow and daughters. [*Maharajah Jagadindra Nath Roy Bahadur v. Rani Hemanta Kumari Debi* (1) was also referred to.]

Sir Erle Richards, K.C., and Dube, for the respondents, were not called upon.

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The judgment of their Lordships was delivered by

MR. AMEER ALI. The dispute in this case relates to the sebaiship of a Hindu temple belonging to the Ballavacharya Gosains situated at a place called Jatipura in the Muttra District of the United Provinces of India.

The Ballavacharya cult, in reality an offshoot of Vaishnavism, was founded in the sixteenth century of the Christian era by one Ballavacharya, who is usually designated among his followers and disciples as Maha Pirbhuji. He and his descendants, who constitute the Ballavacharya Gosain Kul, are held in great veneration by the members of the sect and regarded as the incarnation of the famous and favourite Hindu deity Krishna, whom in common with other Vaishnavs (Vishnuvites) they worship. The cult established by Ballavacharya differed in several particulars from the practices in vogue among other votaries of Krishna, the principal point of difference consisting in the fact that he repudiated the practice of celibacy and asceticism practised by the other Gosains. The Ballavacharya Gosains, in other words the descendants of Ballav, possess several principal temples, each of which is presided over by a member of his kul or family, who is styled a tikait. The defendant Gordhan Lalji is in possession of one of the most important of these temples, if not the most important, which is situated at Nathdwara in Odeypore State.

In order to make the contentions of the parties intelligible, it is necessary to state in this connection certain admitted facts relating to the customs and usages in vogue among the Ballavacharya Kul. In the first place the Ballavacharyas do not intermarry in their own kul, as the members belong to the

same gotra. They take wives from among the Bhats, a well-known Brahmanical caste, and marry their daughters to Bhats. In the Ballavacharya Gosain temples besides the principal image, which is directly or indirectly a presentment of Krishna, there are subsidiary images not enjoying the same worship or veneration but nevertheless regarded as representations of Krishna. They are almost invariably images of one or other of the descendants of Maha Pirbhuji. Another fact necessary to bear in mind is that the ministrations in the Ballavacharya temples are entirely in the hands of the direct descendants of the founder, and the Gosains of his kul are the preceptors of the cult taught by him.

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The temple which forms the subject-matter of dispute in the present case is stated to have been built about the time of the Indian Mutiny, by one Muttuji, a descendant of Ballav and thus a member of his kul. The worship he set up in this new temple was of the image of Sri Madan Mohunji, which is proved to have been brought from the tikait defendant's temple at Nathdwara. This was one of the subsidiary images that were worshipped there along with the principal deity. Muttuji remained in possession of the temple built by him and of the worship performed there until his death in 1883. He left a widow, Satbinda Bahuji, and two daughters, Mussamat Ganga Betiji and Gordhana Betiji. After the death of Muttuji, his widow, Satbinda, carried on the worship until 1888, when she died, and the charge of the temple devolved on Ganga and Gordhana. Ganga died in 1896 and Gordhana in 1902. Both Ganga and Gordhana were married, according to the custom of the sect, to Bhat husbands, and their sons are accordingly called Bhats. The plaintiffs, Mohan Lalji and Gordhan Lalji, are the sons of Ganga, whilst the defendant Madhusudan Lala is the surviving son of Gordhana, and Damudar Lala is her husband.

On the death of Gordhana, these two, together with Anrudh Lala, another of her sons, who was alive at the time, appear to have taken possession of the temple. In 1904 a suit was instituted by the defendant Tikait Gordhan Lalji against Damodar and his two sons to establish his title to the sebaiship, and for possession of the temple. This suit was referred

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to arbitration, and an award was made in his favour under which he obtained possession. During the pendency of that suit, the plaintiffs, the sons of Ganga, brought the present action against Damodar and his two sons for joint possession of the temple and its appurtenances. On August 25, 1905, Tikait Gordhan Lalji was added as a defendant to the suit of Mussamat Ganga's sons.

The plaintiffs' claim against Gordhan Lalji is for ejectment; whilst against the other defendants it is for joint possession. They allege that Muttuji, their maternal grandfather, was the owner of the temple with all its appurtenances; that on his death his widow came into possession of the same by right of inheritance; and that upon her death their mother and their aunt "became the owners of the temple." And they claim to be entitled on the death of Gordhana to joint possession with her husband and sons to an equal share as "owners." It will be noted that they base their right on the ordinary right of inheritance under the Hindu law. The tikait, the real contesting defendant, denied the title put forward by the plaintiffs. He urged that the temple was not the personal property of Muttuji and that the right of inheritance did not attach to it. He further alleged that according to the custom in force among the Ballavacharyas daughters' sons did not belong to their kul and were debarred from taking part in the ministrations at the temple for the benefit of the worshippers; and he claimed that as a collateral relative of Muttuji in the male line he was entitled to succeed him as sebait. He also alleged that the temple was built by Muttuji on land belonging to his (the defendant's) father with his permission, and that on Muttuji's death without leaving any lawful heir the right to the possession devolved on him by virtue of an agreement executed by Muttuji.

On these respective allegations of the parties the trial judge framed a number of issues, only four of which need attention. The second and third put in issue the incapacity alleged by the defendant of daughters' sons succeeding to their maternal grandfathers or taking part in the worship at a Ballav temple. The fourth raised the question whether the property was debottar. The fifth dealt with the claim of the defendant to succeed to the

sebaitship by right of heirship to Muttuji. The Subordinate Judge, on an exhaustive review of the evidence, held on all the issues against the plaintiffs and accordingly dismissed the suit. His decision has been affirmed on appeal by the High Court of Allahabad.

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From the decree of the High Court the plaintiffs have appealed to His Majesty in Council. They, or rather their advisers, abandoned, if not in the first Court certainly in the High Court, their contention that the temple in suit with the appurtenances formed the private property of Muttuji subject to the ordinary law of inheritance. In the High Court the case was discussed and decided on the admission of the plaintiffs' counsel that the property in suit was debottar. In fact, in their Lordships' judgment, the evidence left no room for the opposite contention, for, apart from positive testimony directly bearing on the point, the performance of the worship in accordance with the rites of the sect for whose benefit it was held may be treated as good evidence of dedication. That being so, the ordinary rule of Hindu law relating to the descent of private property is not applicable to the particular right in controversy in this case.

Stress, however, is laid on the principle enunciated in *Gossamee Sree Greedhareejee v. Rumanlolljee Gossamee* (1), where Lord Hobhouse, delivering the judgment of this Board, said as follows: "According to Hindu law, when the worship of a thakoor has been founded, the sebaitship is held to be vested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or there has been some usage, course of dealing, or some circumstances to shew a different mode of devolution." This rule must, from the very nature of the right, be subject to the condition that the devolution in the ordinary line of descent is not inconsistent with or opposed to the purpose the founder had in view in establishing the worship. This qualification is in fact covered by the words used by Lord Hobhouse.

Starting from this point, the first question to determine is whether the plaintiffs, suing for the joint exercise of the right of sebaitship to the temple in suit, have established their competency for the office. The duties which are imposed on the

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person in charge of the temple and of its worship are to be found very comprehensively set forth in Professor Hayman Wilson's "Religious Sects of the Hindoos." Both the Courts in India have found that the plaintiffs, being Bhats, and not belonging to the Gosain Kul, cannot perform the diurnal rites for the deity worshipped by the sect ; they cannot wash, dress, or adorn the image or perform the arti (one of the most important rites), which seems to consist in waving the light before the image of the deity. They cannot touch the food offerings placed before the idols, which are afterwards distributed among the Vaishnav votaries. Nor can they communicate the mantras to the disciples for purposes of initiation. It is to be noted in this connection that whilst the daughters of the Ballav Gosains married to Bhat husbands continue to live in their fathers' houses and remain within their fathers' kul, their sons do not acquire that status ; as sons of Bhats they are Bhats, and not Ballavacharya Gosains who are by virtue of their descent entitled to act as ministers of the cult established by Ballav Maha Pirbhuji.

Another fact is equally clear on the evidence that Bhat girls married into the Gosain Kul receive the mantras and become thenceforth members of the kul. It is not surprising, therefore, that after Muttuji's death his widow and daughters remained in charge of the temple and its worship. But to allow the plaintiffs' claim to an admittedly Ballav temple, where the rites are performed according to Ballav ritual which it is clearly established they cannot perform, would, in their Lordships' judgment, defeat the purpose for which the worship was established.

In an action of ejectment the conclusion at which their Lordships have arrived would be sufficient for the affirmance of the decree appealed against dismissing the plaintiffs' suit. But their Lordships are of opinion that the tikait defendant has succeeded in establishing an independent title of his own to the temple in suit. He appears to be the nearest male relative of Muttuji, both being descendants of two full brothers ; there can be little doubt, also, that the image installed at Jatipura was brought from his temple at Nathdwara, and that the worship founded by Muttuji was an offshoot of the worship in Nathdwara. The temple, again, was built on land belonging to the tikait

defendant, with the permission of his ancestor, who held the office of tikait at the time.

It seems to their Lordships that apart from the statements contained in Muttuji's letter, on which the defendant relied in his written statement, he has a clear title, according to the customs and usages of the Ballav Kul, to the sebaitship of the temple in suit.

Their Lordships are of opinion that the judgment and decree of the High Court are right, and that this appeal must be dismissed; and they will humbly advise His Majesty accordingly.

The appellants will pay the costs.

Solicitors for appellants : *T. L. Wilson & Co.*

Solicitor for first respondent : *Douglas Grant.*

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March 4.

AND TEN CONNECTED APPEALS.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Will made before 1886—Construction—"Justice, equity and good conscience"—Practice—Suits for Ejectment—Conditional Order for Possession.

By a will made in October, 1864, a testator, whose will was, under *Barlow v. Orde* (1870) L. R. 3 P. C. 164, to be construed according to "justice, equity and good conscience," provided, among other dispositions, " . . . (4.) that my private zamindari may, at my demise, descend to my eldest son and to his lawful male children; (5.) in the event of my eldest son dying without lawful male children the above mentioned private zamindari shall descend to my next male heir, and should all my sons die without lawful male children, . . . to my female children, or, in the event of their death, to the female children born in wedlock of my sons in succession." The testator died in November, 1864, leaving three sons and four daughters. The eldest

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son, who was fourteen years of age in 1864, died in 1900 without leaving lawful male children :—

Held, that the eldest son took only a life interest under the will.

Suits of ejectment were brought by the appellant claiming possession of villages and mesne profits. Upon appealing to the Privy Council the appellant asked for a decree for possession conditional upon his discharging incumbrances effectual in favour of the respondents against his right to possession :—

Held that, under the special circumstances of the litigation, the suits should be remitted to the High Court upon the footing that, upon the incumbrances being discharged within such time as the High Court should think reasonable, a decree for possession should be made, and that in default of payment the suits should be dismissed.

CONSOLIDATED APPEALS from eleven judgments and decrees of the High Court (March 2, 1909) reversing eleven judgments and decrees of the Subordinate Judge of Meerut (March 28, 1907).

By a deed dated September 1, 1863, Thomas Skinner mortgaged to a firm of Seths at Muttra certain villages situated in the district of Bulandshahr, in the United Provinces. The mortgage was to secure Rs.50,000 and interest and provided that the mortgagee should be put into possession if the principal and interest were not duly paid. This mortgage covered all the villages in suit except Ainchar (the subject of appeals Nos. 97 and 104), which village was mortgaged by a deed, dated September 7, 1861.

On October 22, 1864, Thomas Skinner executed a will containing provisions for the devolution of all the villages. The material clauses are set out in the head-note and in the judgment.

In November, 1864, Thomas Skinner died without redeeming the mortgages and leaving surviving him three sons, four daughters, and a widow. Thomas Brown Skinner, at that time about fourteen years of age, was his eldest son, and the appellant, Richard Ross Skinner, was his second son. The Court of Wards entered into possession of Thomas Skinner's estate, and in 1867 delivered it to Thomas Brown Skinner, who was entered in the Government registers as proprietor of all the villages. On November 10, 1867, there was due upon the mortgage of 1863 Rs.43,294, and Thomas Brown Skinner placed the Seths in possession under the mortgage to them and borrowed from them

a further sum upon the same security. This transaction was carried out by a deed of the last mentioned date.

Subsequently, under deeds dated October 9, 1869, and February 7, 1872, he borrowed further sums from the same mortgagees upon the same security. Similarly the mortgage of Ainchar by Thomas Skinner was renewed on September 14, 1867, and subsequently further advances were made upon its security. By sales which took place on September 20, 1871, December 20, 1872, and February 23, 1872, the equity of redemption of the various villages was sold by auction in execution of decrees obtained against Thomas Brown Skinner. At these sales the equity of redemption in some of the villages was bought by Lachman Das, the then holder of the mortgages of 1863, 1869, and 1872; the equity in the other villages (including Ainchar) was bought by persons who afterwards redeemed a proportionate part of the mortgages attributable to the particular villages purchased by them respectively. The various respondents were in possession as successors in title to the several auction purchasers. Thomas Brown Skinner died on July 3, 1900, without leaving any lawful male children.

At various dates between August 25, 1905, and July 2, 1906, the appellant, Richard Ross Skinner, instituted the present suits against the persons in possession of the villages. The appellant's case was that Thomas Brown Skinner took under the will only a life interest and that upon his death the appellant became entitled to the villages as remainderman. In his plaint the appellant made no mention of the mortgages; he claimed possession as owner and prayed for unconditional decrees for ejectment and mesne profits. The respondents claimed that Thomas Brown Skinner had an absolute title under the will and that they had acquired good titles under the auction purchases. They further relied upon the mortgagees' rights under the mortgages, either directly or by subrogation, and claimed that in any case the appellant was not entitled to possession without discharging the incumbrances created by Thomas Skinner. There were other defences which are not material to this report.

The Subordinate Judge at Meerut by his judgment delivered

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J. C. on March 28, 1907, held that Thomas Brown Skinner took only a life interest in the will and that the respondents had only acquired that interest. He also held that the other defences failed, and he accordingly made decrees for ejectment and mesne profits.

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The High Court (Sir John Stanley C.J. and Banerji J.) delivered judgments in all the appeals on March 2, 1909. The learned judges were of opinion that it was not necessary to decide the issues relating to the will because the appellant was not entitled to obtain possession of the property until he had redeemed the mortgages created by Thomas Skinner. They further held that, the action being for ejectment and no claim to redeem having been put forward by the plaintiff, a decree for possession conditional upon redemption ought not to be made. The suits were accordingly dismissed.

De Gruyther, K.C., and O'Gorman, for the appellant. If Thomas Brown Skinner took an absolute interest under the will these appeals must fail. Upon a proper construction of the will, however, he took only a life interest. By s. 331 of the Succession Act, 1865, that Act does not apply to wills made before January 1, 1866. The principle of construction applicable to this will is that laid down in *Barlow v. Orde* (1), which referred to the will of a member of the appellant's family. Technical rules of interpretation are to be excluded and the will construed according to "justice, equity and good conscience," that is, according to its natural meaning having regard to the circumstances existing at the time at which it was made. According to the natural meaning of the language used the will gives successive life interests; none of the devisees take an absolute estate unless the estate descends to a son who leaves lawful male children. The testator died about a month after making the will, his eldest son being then fourteen years old. It is impossible to suppose that the testator intended to provide for the possibility of his three sons, their lawful male issue, and his four daughters all predeceasing him. If the will gives, at the testator's death, an absolute estate, the testator provided for these remote possibilities. Having regard to the

(1) L. R. 3 P. C. 164; 13 Moo. Ind. Ap. 277.

mortgages, it is conceded that the appellant is not entitled to an unconditional decree for possession. The High Court, however, should have made a decree in the appellant's favour conditional upon his paying the mortgages created by Thomas Skinner. The appellant now asks for such an order. [Code of Civil Procedure, 1908, s. 153, was referred to.]

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Sir Erle Richards, K.C., and *Kenworthy Brown*, for the respondents in appeals 95, 99, 100 and 102. Admitting that the will has to be construed according to the principle laid down in *Barlow v. Orde* (1), its effect was to give an absolute estate to Thomas Brown Skinner. The devises are to be read alternatively, not successively. The words "at my demise" in clause 4 govern the whole of the provisions as to the devolution of the villages. If those provisions are construed as giving successive life interests, the possibilities under clause 5 would lead to inextricable difficulties of interpretation. The respondents' construction cannot be regarded as an unnatural one, seeing that had the will been made fifteen months later this construction would have been the only one possible under the Succession Act, 1865, s. 84.

The appellant by his case upon the present appeals for the first time claimed a decree in his favour conditional upon his payment of the incumbrances. The Judicial Committee will not exercise its discretion in favour of an appellant who in an action for ejectment asks, at such a late stage, for a conditional decree : *Murugaser Marimuttu v. de Soysa*. (2) The issues in the suit were settled under the Code of Civil Procedure, 1882, s. 146, and no issue was raised as to the discharge of the mortgages.

Raikes, for the respondents in appeal 101 ; *Dube*, for the respondents in appeals 97, 103, 104 and 106 ; *Parikh* and *Roy*, for the respondents in appeals 98 and 105. [*Gokuldoss Gopaldoss v. Rambux Seochand* (3) and *Mata Din Kasodhan v. Kazim Husain* (4) were referred to as to the respondents' rights under the mortgages.]

De Gruyther, K.C., in reply.

(1) L. R. 3 P. C. 164 ; 13 Moo. Ind. Ap. 377.

(2) [1891] A. C. 69.

(3) (1884) L. R. 11 Ind. Ap. 126.

(4) (1891) I. L. R. 13 Allah. 432.

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The judgment of their Lordships was delivered by

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LORD SHAW OF DUNFERMLINE. These are consolidated appeals from eleven judgments and decrees of the High Court of Judicature for the North-Western Provinces, Allahabad. The suits were for ejectment and were brought by the present appellant, Richard Ross Skinner. The Subordinate Judge of Meerut passed ejectment decrees, and the appellant was granted absolute proprietary possession, with mesne profits, of certain villages situated in the district of Bulandshahr in the United Provinces. These judgments and decrees of the Subordinate Judge were reversed by the High Court.

In the proceedings before the Subordinate Judge many issues were taken and questions investigated and discussed. With the exception of those to be hereafter referred to, it is unnecessary to enter upon these questions. For as the result of the discussion before the Board, the appellant made a concession, which was (whatever may have been the nature of the other discussions before the Courts below) no part of his original pleadings or case. In the plaint he prayed "that a decree for full proprietary possession of the entire villages be granted to the plaintiff." He further prayed for mesne profits and for costs of the suit, with interest upon these mesne profits up to the date of realization. It is true that the plaint also concluded "that any further relief which may be considered desirable and necessary be granted to the plaintiff," but, in their Lordships' opinion, this conclusion was treated by the plaintiff himself throughout the proceedings as merely ancillary to or consequential upon the radical demand he made for "full proprietary possession." The case in the Courts of India was throughout conducted upon the footing that he was entitled to this proprietary possession in a full and unconditional sense, that is to say, that any mortgages or duly constituted burdens granted even by Thomas Skinner over the properties were to be treated as wholly unavailing against him. Under the decree obtained no such rights were recognized. His position, in short, was that the whole of these burdens and mortgages might be ignored.

When, however, the case for the appellant to this Board was drawn, an alternative view was submitted, which is contained in

the seventh reason. That reason was in this form : "In any event the High Court of Judicature, Allahabad, should not have dismissed the suits, but should have passed decrees for possession conditional upon the payment of the debts binding on the estate of Thomas Skinner." Their Lordships are of opinion that this case was never either openly or fully set up by the appellant before the Indian Courts, and that great embarrassment to the learned judges therein, and great delay and loss, have ensued to the respondents by reason of the appellant's action in this regard. The Board has experienced considerable difficulty in permitting the alternative to be the ground of judgment now ; and it is only because, in their view it may be possible, out of a large wreckage of procedure, to construct the material for a just decision of the true rights of parties, and because upon the whole this may be in the parties' own best interests, that their Lordships refrain from simpliciter sustaining the appeals and dismissing the suits.

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The villages were the property of one Thomas Skinner, a member of a family not unknown in the history of the North-Western Provinces. In 1863 Thomas Skinner mortgaged inter alia these villages for a sum of Rs.50,000, with interest. It is unnecessary to refer to other mortgages than that of the year 1863 which has just been mentioned, for the principles of the judgment which is to follow are meant to apply comprehensively to the mortgages granted by Thomas Skinner. Detailed reference need not, therefore, be made, for instance, to the mortgage of 1861 granted by him over the village of Ainchar to secure a sum of Rs.4,000. On September 7 of that year this village was mortgaged to the Collector of Bulandshahr. The plaintiff's claim to this village, as to the other villages, has been dismissed. But although this procedure is to be corrected as the result of the judgment of this Board, their Lordships are entirely of the opinion expressed in the judgment of the High Court of date March 2, 1909, to the effect that "the plaintiff is not entitled to oust the appellant without payment of the amount which the predecessors in title of the appellant paid in discharge of the mortgage in favour of the Collector."

The mortgage deed of 1863 above mentioned provided that the

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mortgagees should be put in possession if principal and interest were not paid in accordance with its terms. On October 22, 1864, Thomas Skinner executed a will. In the next month, namely, November, 1864, he died. Under his will an important question to be immediately referred to arises as to what was the nature of the right conferred in the villages upon his son. That son, Thomas Brown Skinner, had possession delivered to him in the year 1867 by the Court of Wards. At that time the Board were informed that there was due on the mortgage for Rs.50,000, granted by his father, Thomas Skinner, a sum of Rs.43,000. The mortgagees were placed in possession by him, and he also himself borrowed further sums in that year, in 1869, and in 1872, and granted mortgages over the properties therefor. In 1872 Lachman Das purchased at a sale, in execution of decrees obtained against Thomas Brown Skinner, the rights under the mortgages both of the father, Thomas Skinner, in 1863, and of the son, Thomas Brown Skinner, in 1869 and 1872. Other transactions and some transmissions took place with regard to the villages, but these need not be entered upon. From this main sketch it is to be observed generally that Thomas Brown Skinner had in point of fact acted, as all parties to the transactions appear to have acted, on the footing that he was the owner of his father Thomas Skinner's estate in the villages, and was the absolute owner. If this was the true view, all questions in the case are at an end, and the suit for possession must entirely fail. How does this question stand?

This depends upon the construction to be given to two clauses of destination occurring in Thomas Skinner's will of 1864. They are in these terms :—

“(4.) That my private zamindari presented to me by Government as a reward for services rendered during the Rebellion of 1857, as well as all villages, houses, and other property added by me from time to time to the original grant may, at my demise, descend to my eldest son, Thomas Brown Skinner, and to his lawful male children according to the law of inheritance.

“(5.) In the event of my eldest son, Thomas Brown Skinner, dying without lawful male children, the above-mentioned private zamindari, &c., shall descend to my next male heir, and should

all my sons die without lawful male children, the zamindari, &c., shall descend to my female children, or, in the event of their death, to the female children born in wedlock of my sons in succession."

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It is strenuously contended that under this destination Thomas Brown Skinner (who, it may be mentioned, was an illegitimate child, and who was, at the date of his father's death, about fourteen years of age) took an absolute estate as contradistinguished from an estate for his life. Reference is made to the Succession Act, 1865, s. 84, which provides that "where property is bequeathed to a person, and words are added which describe a class of persons, but do not denote them as direct objects of a distinct and independent gift, such person is entitled to the whole interest of the testator therein, unless a contrary intention appears by the will"; and one of the illustrations in the section is specially relied upon, namely, "to A. and the heirs male of his body." The Act was passed in the year 1865. By s. 331 of the Act it is enacted that "the provisions of this Act shall not apply . . . to any will made or any intestacy occurring before the first day of January, 1866." But, as stated, Thomas Skinner the testator died in 1864. It is contended, however, that, although this may be so, yet, according to the law of India, prior to the enactment of that Act, a destination to "Thomas Brown Skinner and to his lawful male children according to the law of inheritance" was, in point of fact, an effective form of conveyance of no less than absolute ownership.

In determining this question it is the opinion of their Lordships that the destination must be read in its entirety and together. Following the words quoted there occur these: "In the event of my eldest son, Thomas Brown Skinner, dying without lawful male children, the above-mentioned private zamindari, &c., shall descend to my next male heir." The argument of Richard Ross Skinner, who, in point of fact, was the next male heir, is that his brother, Thomas Brown Skinner, had only the interest of a tenant for life. On reading still further on in the destination it is found that the appellant is not entitled himself, if his own argument be sound, to the position of absolute owner, for the destination continues: "and should all my sons

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die without lawful male children, the zamindari, &c., shall descend to my female children, or, in the event of their death, to the female children born in wedlock of my sons in succession." His learned counsel accordingly conceded that the appellant is, as was his brother before him, only a tenant for life. The event has not yet been ascertained whether the appellant shall or shall not die without lawful male children. If there should be such children, no doubt they would be the absolute owners of the properties, but if he should die childless, then the destination over to female children will, it is argued, take place.

The question is full of embarrassment and difficulty. It is no doubt a temptation to be rid of the troublesome issues, with consequent accountings, by holding that the absolute ownership was in Thomas Brown Skinner; but—for this temptation must be put aside—the only question that their Lordships have to consider is whether it was the testamentary intention of Thomas Skinner, under the form of language adopted, to create by his will an absolute ownership in Thomas Brown Skinner. From the case of *Barlow v. Orde* (1) (in which, it may be observed, the history of the Skinner family is referred to in a judgment of Lord Westbury) it is plain that English rules of interpretation—in so far at least as these are artificial rules of construction which have arisen in the administration of English Courts of Equity—must not be allowed to govern the interpretation of Thomas Skinner's will. Questions affecting the construction of such a settlement as the present, or the regulation of a succession under it, must be determined by the principles of natural justice, or, to use the familiar language, according to "justice, equity and good conscience."

So looking at this settlement, their Lordships do not find themselves able to affirm that Thomas Skinner meant his son Thomas Brown Skinner to have an absolute ownership of these villages. So to conclude would be to affirm that the former a month before his death set forth an elaborate scheme of destinations over, while all the time he was really meaning that the boy of fourteen was to take the absolute ownership if he survived him. If the son was to be a tenant for life merely, then the

(1) L. R. 3 P. C. 164.

detailed regulations for successive enjoyment and descent were entirely in place ; they were natural and necessary. There are considerations either way ; but it seems to their Lordships a more likely and more reasonable conclusion to come to, that Thomas Skinner did mean to regulate the succession after the death of his son, and addressed his mind to the consideration of what should be the steps and order of that subsequent enjoyment of his property. In their Lordships' opinion, accordingly, the possession of Thomas Brown Skinner of these villages was the possession of a tenant for life.

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It follows that the mortgages granted by Thomas Brown Skinner were ineffectual to convey or give any rights over any estate exceeding the tenancy for life of which Thomas Brown Skinner was possessed. The appellant, accordingly, as the next male heir, is entitled to the enjoyment of this estate for life, as of an estate out of the corpus of which no rights could issue which proceeded from Thomas Brown Skinner, and it also follows that the respondents, in so far as they represent such rights and the succession thereto, have no title to interfere with his entry into possession. But the case, in their Lordships' view, stands in a very different position with regard to the rights of mortgagees and their successors under mortgages granted, not by the appellant's brother, but by the appellant's father, Thomas Skinner. With regard to the appellant's brother, it is decided by this judgment that the estate which he possessed was that of a tenant for life, and that mortgages proceeding in respect of debts incurred by him could not affect the estate beyond his life. Even if it be supposed that after he, Thomas Brown Skinner, came into possession he granted mortgages in renewal of those granted by his father and then outstanding, the rights of the mortgagees could not in justice or equity be prejudiced thereby. To hold that they were would be to cause a substantial defeat of the rights of those mortgagees and to imply, what certainly never was the intention of any of the parties to the transaction, that by the renewal of a mortgage by a person with a limited interest in the estate the intention was to operate a discharge of debts effectually secured upon the radical right.

Their Lordships, accordingly, have little difficulty in holding

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that such a result must be avoided, that full effect must be given to the mortgages granted by Thomas Skinner, and that the appellant can only enter upon possession of his rights qua tenant for life of these villages now after satisfying the mortgage debts of his father upon the estate. Their Lordships are glad to observe that the substance of this equity is fully recognized in the judgment appealed from. They express no surprise, looking to the state of the pleadings, and particularly to the unqualified nature of the demand made in the plaint, that these learned judges should have dismissed the same simpliciter, and they view the judgment of the High Court as meant to leave open the determination of the rights of the mortgagees of Thomas Skinner and their successors in some further suit or suits.

Upon the whole, however, it does not appear to their Lordships that justice will be done between these parties if the present suit be dismissed, with the prospect of further litigation to determine a matter now substantially ripe for settlement. They are further of opinion that the appellant is not entitled, even under the present suit, to enter into possession until full satisfaction is first made of the rights of all mortgagees and their successors under the mortgage deeds granted by Thomas Skinner. Should this condition be not, within what appears to the Court below to be a proper and sufficient time, satisfied, then in their Lordships' opinion a decree dismissing the suit in respect of this failure could then be pronounced.

Had the condition of a grant of possession which was conceded at their Lordships' Bar been made upon the plaint or the pleadings in the Court below, the whole of this protracted litigation would have been saved, except to the extent of a simple determination of the point of the construction of Thomas Skinner's will.

In their Lordships' opinion, accordingly, justice to the parties will be most nearly approached if the appellant make payment to the respondents of the costs of the proceedings in both Courts of India, and if, in regard to the appeal before this Board, neither party be found entitled to costs. Their Lordships will accordingly humbly advise His Majesty that the appeals should be allowed; that the causes should be remitted to the High Court to be dealt with

upon the footing that the rights under mortgages granted by the late Thomas Skinner should be satisfied by payment being made to the mortgagees or their successors ; that upon these payments being made, and that within such reasonable time as shall be fixed in the Court below, a decree for possession shall be pronounced in favour of the appellant, and that, failing such payment within such time, the suits shall stand dismissed.

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Solicitors for appellant : *T. L. Wilson & Co.*

Solicitors for respondents : *The Solicitor, India Office* [Nos. 95, 99, 100, and 102] ; *Barrow, Rogers & Nevill* [Nos. 97, 103, 104, and 106] ; *T. C. Summerhays & Son* [No. 101] ; *E. Dalgado* [Nos. 98 and 105].

GULABSINGH AND OTHERS DEFENDANTS ;
AND
RAJA SETH GOKULDAS AND OTHERS . . . PLAINTIFFS.

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Feb. 27 ;
March 6 ;
April 8.

ON APPEAL FROM THE COURT OF THE JUDICIAL
COMMISSIONER OF THE CENTRAL PROVINCES.

Court of Wards—Central Provinces Government Wards Act (XVII. of 1885), ss. 6 and 18—Joint Hindu Family—Managing Member Ward—Power to mortgage Joint Family Property—Sanction of Chief Commissioner.

Held, (1.) that under the Central Provinces Government Wards Act (XVII. of 1885), s. 6, since repealed by Act XXIV. of 1899, the Court of Wards, upon the application of the managing member of a joint Hindu family, could assume the superintendence of the joint family property.

(2.) That it was not necessary under s. 18 of Act XVII. of 1885 that the actual mortgage proposed to be made by the Court of Wards should be submitted to the Chief Commissioner or his previous sanction obtained to its precise terms.

APPEAL from a judgment and decree of the Court of the Judicial Commissioner (May 7, 1907) affirming, with a modification, a judgment and decree of the District Judge of Hoshangabad (April 4, 1906).

* *Present* : LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD MOULTON, SIR JOHN EDGE, and MR. AMEER ALI.

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The chief question for determination in the appeal was whether a registered mortgage deed dated December 10, 1891, and executed in favour of the respondents was valid and binding on the appellants.

The mortgage deed related to certain villages which were the undivided ancestral property of a joint Hindu family, of which the appellants were members. In 1890 Maharajsingh, the father of the first three appellants, and Dulichand, the fourth appellant and father of the fifth appellant, were the senior and managing members of the joint family. On July 1, 1890, Maharajsingh and Dulichand applied in writing to the Deputy Commissioner of Hoshangabad, stating that they were indebted to the extent of over Rs. 1,00,000 and praying that the management of their malguzari villages might be taken over under the Central Provinces Government Wards Act (XVII. of 1885), s. 7 (c) (iv.), and arrangements made for the discharge of their debts. Previously to the date of this application the Deputy Commissioner of Hoshangabad had written to inquire of the respondents, who were bankers and money-lenders, whether they would be prepared to advance Rs. 1,00,000 to the Court of Wards of the estate upon interest at 6 per cent. per annum, and the respondents by letter of June 23, 1890, had expressed their readiness to do so. The Deputy Commissioner of Hoshangabad on July 2, 1890, forwarded the application of Maharajsingh and Dulichand to the Commissioner of the Nerbudda Division with a covering letter stating that the total liabilities of the applicants amounted to Rs. 1,20,358 and giving particulars relating to the income and expenditure of the estate; he further stated that it was proposed to borrow Rs. 1,00,000 from the respondents and gave particulars of the terms as to repayment upon which the respondents were willing to advance that sum. The Deputy Commissioner concluded by recommending that "the Chief Commissioner be asked to sanction the assumption of management by the Court of Wards till liquidation of the liabilities of the family." After correspondence between the Deputy Commissioner and the Commissioner and some consequent modification by the respondents, at the request of the Deputy Commissioner, in the terms as to repayment, the Chief Commissioner on January 28, 1891,

sanctioned the assumption of management by the Court of Wards in a letter in the following terms :— “ With reference to the correspondence I am directed to communicate the officiating Chief Commissioner’s sanction to the assumption by the Court of Wards, Hoshangabad, of the management of the estate of Maharajsingh and Dulichand, malguzars of Baherakhedi and other villages in that district. Mr. Niell also sanctions an allowance of Rs. 833 per annum being made for the maintenance of the proprietors and accepts the proposals for the liquidation of the debt.”

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On Januray 31, 1891, an official notification of this sanction appeared in the *Central Provinces Gazette*. On March 12, 1891, the Deputy Commissioner wrote to the respondents stating that he wished to borrow Rs. 1,20,000 instead of Rs. 1,00,000 and on easier terms as to repayment ; to this proposal also the respondents agreed. On March 24, 1891, the respondents advanced the sum of Rs. 1,20,000 to the Deputy Commissioner as Court of Wards, and in the course of the next month the Deputy Commissioner applied the money so advanced in paying off the creditors, who were mostly secured, of Maharajsingh and Dulichand.

On December 10, 1891, the mortgage deed in suit was executed in favour of the respondents by the then Deputy Commissioner as Court of Wards, acting on behalf of Maharajsingh and Dulichand, who were therein called the mortgagors, “ which term shall be deemed to include their heirs executors and assigns.” The property mortgaged was detailed in a schedule annexed to the deed. The loan, Rs. 1,20,000, was to be repaid with compound interest at 6 per cent. per annum by annual payments of Rs. 10,000. There were also provisions for sale in the event of failure to pay three of the annual instalments, and a further provision referred to in the judgment of their Lordships but material only to a secondary point. During 1892 and 1893 the Court of Wards paid Rs. 16,000 to the respondents, who received nothing further. In 1896 Maharajsingh died, and his three sons, the first three appellants, succeeded to his share of the estate, which continued to remain under the management of the Court of Wards. In 1899 the Act XVII. of 1885 was repealed

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by Act XXIV. of 1899, and under the latter Act the Commissioner of the Division became the Court of Wards in place of the Deputy Commissioner. Early in 1902, owing to the hopeless financial position of the estate, the Court of Wards applied for and obtained the sanction of the Chief Commissioner to its relinquishment from the management of that Court. Eventually a notification dated August 23, 1902, appeared in the local *Gazette* to the effect that the superintendence of the estate, the subject-matter of the mortgage deed in suit, had, with the sanction of the Chief Commissioner, been relinquished by the Court of Wards, and possession of the mortgaged premises was given to the appellants.

On September 22, 1904, the respondents commenced the present suit, claiming the sum of Rs. 2,32,403 as principal and interest due under the mortgage and praying for the usual decree for sale of the mortgaged properties or, in the alternative, equitable relief. The defendants were the appellants and other members of their joint Hindu family and certain decree holders who had attached portions of the property. The appellants by their written statements pleaded (inter alia) that the mortgage deed was void for the want of the previous sanction of the Chief Commissioner as required under the Central Provinces Wards Act (XVII. of 1885), s. 18, and that the mortgage did not bind the interests of the appellants other than Dulichand in the properties mortgaged.

The District Judge delivered judgment on April 4, 1906, holding (inter alia) that the loan was raised with the previous sanction of the Chief Commissioner and that there had been a sufficient compliance with s. 18 of Act XVII. of 1885. In the result he made a decree as prayed with costs and future interest. The Court of the Judicial Commissioner on May 7, 1907, affirmed the judgment of the District Judge upon all points material to the present appeal. On the hearing of the appeal the Judicial Commissioner, with the consent of the parties, ascertained from the Government Secretariat that the sanction of the Chief Commissioner "to the mortgage as such" had not been given. The Judicial Commissioner held that the mortgage was not void but only voidable, and that being clearly for the

benefit of the wards on whose behalf it was made it should be upheld. In the result, subject to a slight modification as to the amount recoverable personally against the appellants, the appeal was dismissed.

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Lowndes, for the appellants. There was no application to the Chief Commissioner to sanction any mortgage and he never exercised the discretion which the Act intended that he should have in the matter. The Deputy Commissioner's letter of July 2, 1890, only asked for the Chief Commissioner's sanction to the assumption of management by the Court of Wards. Even if sanction to a mortgage upon the terms referred to in that letter can be inferred, the terms both as to the amount of the loan and the method of repayment were subsequently varied, and there is no evidence of any sanction to the terms so varied. A mortgage by the Court of Wards without previous sanction is absolutely void, the sanction being in effect a condition precedent to the Court of Wards' authority. Without it the Court of Wards were not authorized to dispose of the property within the meaning of the Transfer of Property Act, 1882, s. 7. Even if the mortgage was duly sanctioned it does not bind the interest of the appellants other than Dulichand. It is clear from the notification in the *Gazette* that only Maharajsingh and Dulichand were made wards, and s. 18 of Act XVII. of 1885 only gave the Court of Wards power to mortgage the "property" of the ward; it did not give them the same power to mortgage the joint family property that the ward had as managing member. Even if it gave a power to mortgage the joint family property the sons of Maharajsingh were only bound in respect of their father's debt and Dulichand's son in respect of his father's debt.

De Gruyther, K.C., and *Parikh*, for the respondents. The sanction required by the Act is only a sanction to mortgage the property and not sanction of a particular mortgage. A sanction to mortgage the property is to be inferred from the correspondence and the surrounding circumstances. The benefit of the Act would be largely illusory if it could not be applied to the property of Hindu joint families, and it can only be so applied

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by making the manager a ward. The scheme of the Act is that where the managing member of a joint family is made a ward then the whole joint family property is taken over. The word "property" in s. 18 cannot mean the interest of the ward in the joint family property, for the interest of individual members of a Hindu joint family is not individual property, and no member can predicate that he has a definite share in the property: Mayne's Hindu Law and Usage, 7th ed., p. 480; *Appoviar v. Rama Subba Aiyar* (1); *Madho Parshad v. Mehbran Singh* (2); *Gharib-ul-Lah v. Khalak Singh*. (3)

Even if the Court of Wards had no power to bind the joint property by the mortgage, they were, under the letter of the zamindars, acting on behalf of the joint family in obtaining the loan, and seeing that the money was applied to the discharge of debts binding upon the joint family property, the respondents are entitled in equity to recover against the joint family: *Baroness Wenlock v. River Dee Co.*(4); *Reversion Fund and Insurance Co. v. Maison Cosway, Ltd.* (5)

Lowndes in reply. The construction of the Act contended for by the respondents would give the Court of Wards a wider power to mortgage the joint family property than the managing member possesses, for he can only mortgage for the benefit of the joint family. The equitable doctrine does not apply. The Court of Wards only had the authority of the joint family to act as Court of Wards, and in borrowing the money they only purported to act in that capacity.

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April 8.

The judgment of their Lordships was delivered by

SIR JOHN EDGE. This is an appeal from a decree, dated May 7, 1907, of the Judicial Commissioner of the Central Provinces which affirmed with slight modifications a decree, dated April 4, 1906, of the District Judge of Hoshangabad.

The suit in which the appeal arose was brought on September 22, 1904, in the Court of the District Judge of Hoshangabad by mortgagees upon a mortgage of immovable property which was

(1) (1866) 11 Moo. Ind. Ap. 75.

(2) (1890) L. R. 17 Ind. Ap. 194.

(3) (1903) L. R. 30 Ind. Ap. 165.

(4) (1887) 19 Q. B. D. 155.

(5) [1913] 1 K. B. 364.

made on December 10, 1891, by the Deputy Commissioner of the district of Hoshangabad as and being the Court of Wards for that district. The suit was one for possession of the mortgaged property including the sir lands, or alternatively for a decree for sale. Certain other alternative reliefs were claimed.

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The defences to the suit, so far as they are now material, were that the mortgage had, it was alleged, been made by the Deputy Commissioner without the previous sanction of the Chief Commissioner and was void; that the property mortgaged was the undivided ancestral property of a joint Hindu family under the rules of the Mitakshara, and that the Court of Wards had no right or authority to mortgage the shares, rights, or interests of those members of the family who were not Government wards or who were minors; and that no decree for sale, or for possession, or for any of the alternative reliefs could be made.

The District Judge on April 4, 1906, having found that there was then due on the mortgage Rs. 2,32,403 for principal and interest, made a conditional decree for sale. From that decree only the defendants Gulabsingh, Tikaram, Sitaram, Dulichand, son of Pemsha, and Himmatsingh, who are the appellants here, appealed to the Court of the Judicial Commissioner. The Judicial Commissioner on May 7, 1907, on appeal, slightly varied the decree of the District Judge and added a declaration that the defendants were not personally liable for any sum by which the sale proceeds of the mortgaged property might fall short of the amount due for the time being on the mortgage, and in other respects affirmed the decree for sale of the District Judge, with costs of the appeal to his Court against the then appealing defendants. On August 25, 1908, the then District Judge of Hoshangabad, finding that the defendants had not paid into Court or to the plaintiffs Rs. 2,67,871.10.8, principal, interest, and costs, made a decree absolute for sale of the mortgaged property specified in a schedule to that decree, and allowed interest on the decreed sum from July 24, 1908, until liquidation, adding the declaration which had been made by the Judicial Commissioner.

For the purposes of this appeal it is necessary to refer as briefly

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as may be to the facts antecedent to the commencement of this suit. On or shortly before July 1, 1890, Maharajsingh, now dead, and his brother Dulichand, a defendant to this suit, who described themselves as zamindars of Baherakhedi, Bagalkhedi, Patlai, Punwasa, Bamuria, and Sarora, Pargana Hoshangabad, made a written application to the Deputy Commissioner of Hoshangabad, in which they stated that they were indebted to the extent of about Rs. 1,14,358.11.9; that they were neither able to arrange for the liquidation of the debt nor to manage the estate; and that if the villages should be lost on account of the indebtedness, "our children will have no estate left to them"; and prayed that "if, under section 7 (c) (iv.) of Act XVII. of 1885, you be pleased to assume the management of our malguzari villages of Baherakhedi and others, and to arrange for the discharge of our debt in any way possible, our estate will be saved and our children will thereby be able to maintain themselves, for which they will ever remain grateful to you. The rest lies with you."

The villages mentioned in the petition were the undivided ancestral property of a joint Hindu family governed by the rules of the Mitakshara, and Maharajsingh and Dulichand, who were brothers, were the senior and managing members of that family. At that time the joint family consisted of Maharajsingh, his son Gulabsingh, then about thirty-six years old, Tikaram, then about twenty-one years old, and Sitaram, then about nine years old, and Dulichand and his sons Hinmatsingh, then about twenty-two years old, Bajilal, then about sixteen years old, Fatichand, then about eight years old, and Jaganath, then about five years old, and a son of Gulabsingh named Dinanath, who was then about eight years old. The indebtedness of the family in respect of which the property was liable to be lost amounted to about Rs. 1,20,000. As will later appear, the petition was duly forwarded to the Chief Commissioner for his sanction to the Court of Wards assuming the superintendence of the property mentioned in the petition, that sanction was given, and in the result the mortgage was made upon which this suit was brought.

Having regard to the defences which were set up in this suit, it is necessary to consider with what object that petition was

presented to the Deputy Commissioner, and what authority, if any, Maharajsingh and Dulichand had to bind the other members of the joint family by their action in presenting the petition. It has been contended on behalf of the appellants that Maharajsingh and Dulichand had power to bind only their own individual interests in the joint property, and that if their object was to get the Court of Wards to assume the superintendence of the joint family property, they acted without authority and their action could not and did not bind the other members of the joint family.

Maharajsingh and Dulichand were zamindars and were the malguzars of the property mentioned in their petition, and were, as their Lordships have said, the senior and managing members of the joint family of which the property mentioned in their petition was the ancestral property. The application was made under the Central Provinces Government Wards Act, 1885, Act XVII. of 1885. The application was not drawn up with the precision with which it probably would have been drafted by a trained lawyer, but, as has been pointed out by this Board in more than one appeal, the art of conveyancing is but little understood in the country parts of India. It must, in their Lordships' opinion, be taken that, in making the application to the Deputy Commissioner, Maharajsingh and Dulichand were acting in their capacity as the managing members of the joint family and not merely as two members of the family applying only in their own individual interests.

It appears to their Lordships to be obvious that the intention of Maharajsingh and Dulichand in making that application was that the Court of Wards should in the interests of all the members of the joint family assume the superintendence of the immovable property which was the ancestral property of the joint family, and not merely the management and superintendence of the then unascertained and unpartitioned shares in the joint property, which on a partition of that property, not then in contemplation, might possibly come to Maharajsingh and Dulichand. Neither Maharajsingh nor Dulichand had more than the mere coparcenary interest of a member of the joint family in the family property. Neither of them had any defined share. It was held by this

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Board in 1903, in *Gharib-ul-Lah v. Khalak Singh* (1), that the interest of a member of an undivided Mitakshara family in the family property is not individual property. It had previously been held by this Board in 1866, in *Appoviar v. Rama Subba Aiyar* (2), that no member of a joint Hindu family, whilst it remains undivided, can predicate of the joint or undivided property that he has a certain definite share. It has not been shewn to their Lordships that it was the practice of the Court of Wards of the Central Provinces to assume the superintendence of the unpartitioned interests of some only of the members of a joint Hindu family in the family property, nor has it been explained in this appeal how a joint family property could be preserved for the members of a joint family by a Court of Wards assuming the superintendence of the unpartitioned interests of some only of the members of the family. Under the circumstances of the family, Maharajsingh and Dulichand acted prudently and in the best interests of the joint family in applying to the Deputy Commissioner of Hoshangabad to have the family property taken under the management of the Court of Wards, and in their Lordships' opinion Maharajsingh and Dulichand in making that application acted within their powers and authority as the managing members of the joint family.

Before, apparently, that formal application was made, the Deputy Commissioner had been in communication with the plaintiffs' firm to ascertain the terms upon which they would advance the money required for the liquidation of the then indebtedness of the family on the security of the immovable property of the family, which he described in a letter of June 21, 1890, as consisting of five whole villages, a 12 annas share in another village, and twenty plots held on absolute occupancy tenures in different villages. In that letter the Deputy Commissioner enclosed "a list of the property it is proposed to hypothecate, with particulars as to income and expenditure." It is obvious that from the first it was on the security of a mortgage of the ancestral property of the family that it was intended to obtain a loan from the plaintiffs.

On July 1, 1890, the Deputy Commissioner of Hoshangabad

(1) L. R. 30 Ind. Ap. 165.

(2) 11 Moo. Ind. Ap. 75.

forwarded to the Commissioner of the Nerbudda Division the application of Maharajsingh and Dulichand, praying that their estate might be taken under the management of the Court of Wards, and having mentioned his estimate of the then indebtedness as Rs. 1,14,358.11.9, the annual income of the property and the outgoings, and that it was proposed to borrow Rs. 1,00,000 from the plaintiffs' firm, he recommended that the Chief Commissioner should be asked to sanction the assumption of the management of the property by the Court of Wards until the liabilities of the family should be liquidated. There was some further correspondence between the Deputy Commissioner, the Commissioner of the Nerbudda Division, and the Secretariat of the Central Provinces, and ultimately, on January 28, 1891, the Commissioner of the Nerbudda Division was informed by the Secretariat that the Chief Commissioner had sanctioned the assumption by the Court of Wards, Hoshangabad, of the management of the estate of Maharajsingh and Dulichand, malguzars of Baherakhedi and other villages in that district, and had also sanctioned an allowance of Rs. 883 per annum being made for the maintenance of the proprietors, and accepted the proposals for the liquidation of the debt. What were the precise terms of those proposals does not appear from the papers which are before the Board, but it may be assumed from the papers which are before the Board that the proposals which were approved by the Chief Commissioner included a proposal to obtain from the plaintiffs' firm, on the security of a mortgage of the ancestral property, a sum sufficient to liquidate the then indebtedness of the family.

On January 31, 1891, the following official notification appeared in the *Central Provinces Gazette* :—

“No. 609.—Declaration by the Chief Commissioner under section 7 (1.) (c) of the Central Provinces Government Wards Act (XVII. of 1885).

“The Chief Commissioner is pleased to declare Maharajsingh and Dulichand, malguzars of Baherakhedi, in the Hoshangabad District, on their own application, incapable of managing their property, and has sanctioned the assumption of its superintendence by the Court of Wards of that district.”

The property referred to in that notification must, in their

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J. C. Lordships' opinion, be deemed to have been all the immovable
 1913 property which constituted the ancestral estate of the joint family
 — which was under the management of Maharajsingh and Duli-
 GULAB- chand and was referred to in their application. It was that
 SINGH ancestral property which it had been proposed by the Deputy
 v. SETH Commissioner should be taken under the superintendence of the
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 — liquidated. It was by a mortgage of that property that it was
 intended to raise a sum sufficient to liquidate the indebtedness of
 the family. It could not have been intended that the Court of
 Wards should take over the management and superintendence of
 the family property so far only as the unpartitioned interests of
 Maharajsingh and Dulichand in the joint family property were
 concerned ; if that had been the object, it would have frustrated
 the intention with which the proposal was made that the super-
 intendence of the property should be assumed by the Court of
 Wards.

One effect of the notification was expressly to disqualify
 Maharajsingh and Dulichand to manage the family property.
 It could not have been intended that they should be disqualified
 so far only as their own unpartitioned interests in the property
 were concerned, and that they should be qualified to manage the
 property so far as the interests of the other members of the
 family were concerned ; nor could it have been intended that
 the Court of Wards and the members of the joint family other
 than Maharajsingh and Dulichand should jointly manage the
 unpartitioned family property.

Act XVII. of 1885 was not as precisely worded as it might
 have been, but it obviously was intended to apply to the super-
 intendence by the Court of Wards of the family property of
 Hindu joint families as well as to the superintendence of separate
 property of Hindus and others situate within the territories for
 the time being administered by the Chief Commissioner of the
 Central Provinces. In passing Act XVII. of 1885 the Indian
 Legislature could not have been unaware that much of the
 immovable property held by Hindus within these territories was
 family property of joint Hindu families. It is difficult to see
 how the Court of Wards could exercise some of the powers

entrusted to it under the Act, as, for example, the power of letting the whole or any part of the property of Government wards under its superintendence, or could perform the duties of superintendence, which included the management and collection of rents, unless in such a case as this the Chief Commissioner was entitled under the Act to sanction the assumption by the Court of Wards of the superintendence of the family property of the joint Hindu family, whether the application that the property should be taken under the management of the Court of Wards was made by all the members of the family or by the managing members only. Their Lordships are of opinion that the Chief Commissioner had power to sanction the assumption by the Court of Wards of Hoshangabad of the superintendence of the joint family property which was the property mentioned in the application of Maharajsingh and Dulichand.

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It must in their Lordships' opinion be inferred from the letter of January 28, 1891, from the Secretariat to the Commissioner of the Nerbudda Division that the Chief Commissioner of the Central Provinces had given his sanction to the proposal that the Court of Wards of the district of Hoshangabad should mortgage the property of the family in order to raise a sum sufficient for the liquidation of the indebtedness. It was not in their Lordships' opinion necessary under s. 18 of Act XVII. of 1885 that the actual mortgage to be made by the Court of Wards should be submitted to the Chief Commissioner for his sanction, nor was it necessary that the Court of Wards should have his sanction to the precise terms of the mortgage. The sanction which is to be inferred from the letter of January 28, 1891, empowered the Court of Wards to mortgage the property under s. 18 of Act XVII. of 1885.

It having been agreed between the Court of Wards and the plaintiffs' firm that they should advance Rs. 1,20,000 on the security of a mortgage of the family property, the plaintiffs' firm in March, 1891, advanced the Rs. 1,20,000, and by March 25, 1891, the Court of Wards with the money so advanced discharged the then indebtedness of the family. On December 10, 1891, the Court of Wards of Hoshangabad in the exercise of its statutory power made the mortgage upon which this suit has

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been brought. In their Lordships' opinion the Court of Wards had obtained from the plaintiffs' firm most favourable terms for the loan, although owing to then unforeseen circumstances the object of saving the property for the family has not been obtained.

By the mortgage all the right, title, and interest of the mortgagors in the property mentioned in the first schedule to the mortgage, together with all actual and reputed rights, easements, and appurtenances to the same, and all cultivated and uncultivated land, groves, abadi, sir, rents, and profits, by whatever name the same should be known, were hypothecated by way of mortgage to the mortgagees. The mortgage money was to be repaid with interest by annual instalments extending over more than thirty years. It was agreed that in the event of Rs. 30,000 becoming overdue the Court of Wards should recover such sum by sale or otherwise of sufficient of the hypothecated property.

The mortgage deed also contained the following important clauses :—

“ And it is further agreed that the Court of Wards shall continue to manage this estate so long as there is any prospect of the debt being repaid from income of the same, and that if from any cause this should appear impossible, that the Court of Wards shall, if the mortgagors so desire, either sell up the entire property or so much as may be necessary and devote the proceeds to liquidation of the debt, or make the estate over to the mortgagees if they prefer this course in satisfaction of their claims, and that upon such sale or transfer all further liabilities on the part of the Court of Wards towards the mortgagees shall cease.

“ And it is further agreed that it will not relinquish management of the estate till such time as the debt is liquidated in ordinary course, or in the event of management being relinquished before such time, liquidate the debt remaining due by sale of such portion of the property as may be necessary or otherwise.”

During the years 1892 and 1893 the Court of Wards paid to the mortgagees Rs. 16,000. Since then no instalment has been paid. The Court of Wards, owing to unforeseen circumstances,

found it impossible to pay the balance of the mortgage debt or any other instalments or interest, and on December 10, 1901, the plaintiffs called upon the Court of Wards either to put them in possession of the mortgaged property or to pay the sums due under the mortgage. On March 13, 1902, the Deputy Commissioner of Hoshangabad, who was the Court of Wards, by letter of that date, gave the plaintiffs notice that the relinquishment of the management of the estate by the Court of Wards had been sanctioned, and offered to make over to them the mortgaged portion of the estate "in full satisfaction of your claims with all outstanding rental arrears and debts, excepting the cultivating rights in sir land which are to be reserved for the maintenance of the wards."

It is to be observed that in that letter the members of the joint Hindu family were treated as Government wards. The offer to hand over the mortgaged property less the sir lands was not in compliance with the contract in that respect in the mortgage deed, and was declined. On August 23, 1902, it was officially notified that the superintendence of the estate of the family had, with the sanction of the Chief Commissioner, been relinquished by the Court of Wards with effect from June 12, 1902. The mortgaged property was not sold by the Court of Wards, the mortgage debt, with the exception of Rs. 16,000 which were paid in 1892 and 1893, has not been paid, and the Court of Wards did not transfer the mortgaged property to the mortgagees, and the management of the estate was relinquished by the Court of Wards. Their Lordships are of opinion that under these circumstances the moneys remaining unpaid under the mortgage became payable, and the plaintiffs were entitled to bring this suit for sale. Their Lordships will humbly advise His Majesty that the decree of the Judicial Commissioner should be affirmed, and that this appeal should be dismissed. The appellants must pay the costs of this appeal.

Solicitors for appellants : *Downer & Johnson.*

Solicitors for respondents : *T. L. Wilson & Co.*

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J. C.* GANESHA ROW PLAINTIFF;
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ON APPEAL FROM THE HIGH COURT OF MADRAS.

*Practice—Minor—Guardian ad litem—Father and Managing Member Guardian
 —Compromise—Leave of the Court—Code of Civil Procedure, 1882, s. 462.*

When the father of a minor, a member of a joint Hindu family, of which the father is the managing member, is appointed his guardian ad litem, his powers as managing member, so far as they relate to the minor's interest, are controlled by the Code of Civil Procedure, 1882, s. 462, and he cannot, without the leave of the Court, enter into any agreement or compromise on behalf of the minor with reference to the suit.

APPEAL from a judgment and decree of the High Court (September 28, 1909) affirming a judgment and decree of the said Court in its original jurisdiction (September 2, 1908).

In 1871 one Venkata Row, the senior member of a joint Hindu family, died leaving four sons, of whom the present respondents were the third and fourth, and a widow. In 1886 Athmaran Row, the son of Venkata Row's second son, instituted a suit against his father and uncles and Venkata Row's widow for partition of the joint family property. After the institution of the suit the present appellant Ganesha Row, the son of the respondent Rajaram Row, was born and was joined as a defendant, his father being appointed his guardian ad litem. After various intermediate proceedings, on October 21, 1896, a final decree in the suit was made by the High Court. By this decree the respondent Tuljaram Row was held liable in various sums to his co-sharers, and among others two sums amounting to about Rs. 50,000 were decreed as payable by him to the respondent Rajaram Row, and it was further held that the respondent Tuljaram Row was liable for larger sums of money on the footing of wilful default, and that the joint family were entitled to a moiety of the profits from 1881 of a printing

* *Present* : LORD MOULTON, SIR JOHN EDGE, and MR. AMEER ALI.

business claimed by the respondent Tuljaram Row. Appeals against this decree were filed by both the present respondents and by Venkata Row's widow.

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On August 17, 1897, a further decree was made by the High Court in the proceedings, whereby the respondent Tuljaram Row became liable for a further sum to his co-sharers, the share of Rajaram Row amounting to about Rs. 34,000. The respondent Tuljaram Row did not discharge the liabilities imposed upon him by these decrees, but entered into negotiations with the various members of the family for a settlement of their claims.

By a written agreement between the respondent Tuljaram Row and the respondent Rajaram Row dated November 21, 1897, it was provided that Rajaram Row "acting for himself and for his minor son Venkata Row" (another name for the present appellant Ganesha Row) should "relinquish and disclaim for himself and as guardian for his minor son Venkata Row" all his rights against the respondent Tuljaram Row under the said decree and would release and discharge Tuljaram Row "from all liability in respect thereof to himself and to his minor son Venkata Row," and further that the respondent Rajaram Row should enter up satisfaction of the decrees. The consideration stated for this agreement was that the respondent Tuljaram Row should withdraw his appeal and should discharge the family liabilities set out in the original decree and indemnify Rajaram Row against the same. These liabilities amounted to Rs. 4,174, of which the share of the respondent Rajaram Row and his son, the appellant, was Rs. 1,044. Thereupon the appeals were withdrawn and satisfaction of the decrees entered up. No leave of the Court to these acts of the guardian ad litem were ever sought or obtained.

In 1906 the present appellant attained his majority, and having repudiated the agreement of November 21, 1897, called upon the respondent Tuljaram Row to pay the sum for which he was liable under the decrees.

On November 7, 1907, the appellant instituted the present suit against his uncle and father, the respective respondents. He alleged that the agreement had been entered into without consideration and in fraud of his interest and without the

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sanction of the Court, and he prayed for a decree against the respondent Tuljaram Row for the amount of the decrees with interest thereon. The first respondent Tuljaram Row by his written statement denied the mala fides alleged and contended that the compromise agreement was valid. The second respondent Rajaram Row did not appear. Issues were settled as to whether there was consideration for the agreement and whether the compromise and subsequent entering up of satisfaction were invalid as against the plaintiff by reason of ss. 461 and 462 of the Code of Civil Procedure, 1882. Issues 6 and 7, referred to at the end of their Lordships' judgment, were as follows : " 6. Is the plaintiff entitled to recover in any event more than a moiety of the amount sued for ? 7. Is the plaintiff entitled to charge interest, and if so, at what rate ? "

The judgment of the High Court in its original jurisdiction was delivered on September 2, 1908, dismissing the suit. The view taken by the learned judge appears from the passage from his judgment cited in the judgment of their Lordships. On appeal the High Court affirmed this decision, taking substantially the same view as that expressed in the judgment appealed from. The learned judges considered that the leave of the Court was not necessary, for although the respondent was not entitled to receive the decretal moneys as his separate property, he was the sole decree-holder, and as such was, in their opinion, entitled to execute the decree and to enter up satisfaction.

De Gruyther, K.C., and *Kenworthy Brown*, for the appellant. Under s. 462 of the Code of Civil Procedure, 1882, the leave of the Court was necessary to validate the compromise agreement, and none the less so because the guardian was the appellant's father. The view that the second respondent was acting not as guardian but as a defendant is contradicted by the language of the agreement. If he was not acting as guardian, then the appellant was not a party to the compromise.

Sir Erle Richards, K.C., and *Dunne*, for the first respondent. The High Court were right in holding that upon the form of the decree, which was in favour of this respondent personally, the leave of the Court was not necessary. The decision in *Virupakshappa*

v. Shidappa and Basappa (1) is distinguishable on this ground. The only class of case intended to be covered by s. 462 is that in which the minor has an immediate interest in the subject-matter of the compromise. If the compromise is set aside and the infant remitted to his rights, then this respondent should also be remitted to his right to appeal which was abandoned under the agreement.

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De Gruyther, K.C., in reply, referred to *Manohar Lal v. Jadu Nath Singh and Others* (2), as to the minor's right to be remitted to his original position, and to the Code of Civil Procedure, 1882, s. 562.

The second respondent did not appear.

The judgment of their Lordships was delivered by

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MR. AMEER ALI. This is an appeal from a judgment and decree of the High Court of Madras, dated September 28, 1909, which, affirming a decree made in the exercise of its original civil jurisdiction on September 2, 1908, dismissed the plaintiff's suit.

The facts which have given rise to the present action relate back to the year 1886. The defendants Tuljaram and Rajaram are two brothers, being the sons of one Venkata Row, who died in 1871. Tuljaram and Rajaram, with two other sons of Venkata Row named respectively Rama Chandra Row, since deceased, and Luchmana Row, formed a joint undivided Hindu family. In 1881 there was a dissolution of the joint family and a partial division of the family property. A large proportion of the assets was, however, left undivided in the hands and under the control of Tuljaram, the first defendant, who seems to have been the managing member of the family in respect at least of the business or businesses in Madras.

In 1886 a suit was brought on the original side of the High Court of Madras by Athmaran, the son of Luchmana Row, against Tuljaram for ascertainment of the remaining undivided family assets in his hands, for accounts and partition and other relief. This seems shortly to have been the general scope of the action instituted in 1886, in which Rajaram, the present plaintiff's

(1) (1901) I. L. R. 26 Bomb. 109.

(2) (1906) L. R. 33 Ind. App. 128.

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father, and other surviving members of Venkata Row's family were parties. The plaintiff in the present suit, Ganesha Row, who was not born at the time of the institution of the suit, was added as defendant on his birth in December, 1887, and by an order dated November 20, 1888, his father Rajaram was appointed his guardian ad litem.

On January 14, 1892, a preliminary decree was made declaring the rights of the parties and directing accounts against Tuljaram.

By the final decree made on October 21, 1896, and a subsequent order of August 17, 1897, he was declared accountable to the family for a considerable sum of money, the share of the plaintiff's branch in the total sum being, according to the High Court, about Rs. 86,000. Tuljaram appears to have filed an appeal from the final decree of the first Court, and during its pendency he entered into agreements with the adult parties to the suit by which they either abandoned their claims, as in the case of the plaintiff's father, or compromised them for smaller sums.

Rajaram's agreement, which is dated November 21, 1897, recites that he "acting for himself and as guardian for his minor son Venkata Row" (another name for the plaintiff) "with a view to terminate the litigation that had been going on in the family for the past eleven years and more, and to make an amicable settlement of all matters in dispute between the several members of the family," and in consideration of the defendant Tuljaram consenting to withdraw his appeal, Rajaram agreed to "relinquish and disclaim for himself and for his minor son Venkata Row" the several sums of money for which Tuljaram was found liable to Rajaram's branch, and "to release and discharge Tuljaram from all liability in respect thereof to himself and to his minor son Venkata Row." And on November 25, 1897, Rajaram instructed the registrar of the High Court "to enter up satisfaction of the decree" in respect of the several sums which amounted in the aggregate to something like Rs. 86,000. Tuljaram also on his side withdrew the appeal he had preferred against the decree. Admittedly no leave was either applied for or obtained from the Court in regard either to the agreement or the entering up of satisfaction of the decree.

Matters remained in this condition until the plaintiff attained his majority. After some preliminary proceedings to which it is unnecessary to refer for the purposes of this judgment, he brought this suit on November 7, 1906, to recover from the defendant Tuljaram on the basis of the decrees in the suit of 1886 a sum of Rs. 1,60,000 principal and interest.

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Rajaram was also made a defendant in this action, and his acts relating to the agreement and the satisfaction entered under it were challenged as fraudulent, without consideration, and not binding on the plaintiff, having been made without leave of the Court.

The learned judge on the original side of the High Court who tried the case was of opinion that the suit was not maintainable in view of the provisions of s. 244 of the Code of Civil Procedure. Treating it, however, as an application under that section, he dealt with the matter on its merits.

He held that the compromise entered into by Rajaram was binding on the plaintiff, and that it was supported by consideration which consisted in the withdrawal by Tuljaram of his appeal. The principal ground of his judgment is to be found in the following passage :—

“ In this case under the terms of the decree the money in respect of which the agreement was arrived at and satisfaction entered up was made payable to the third defendant personally and not to the minor sixth defendant. If the minor had been represented by another guardian ad litem the third defendant could just as well have made the compromise and entered up satisfaction of the amount payable to him under the decree and it could not have been suggested that s. 462 was applicable to the case. It makes no difference in my opinion that the third defendant happened to be the guardian ad litem of the sixth defendant because in making the compromise and entering up satisfaction he was not acting as guardian ad litem on behalf of the minor sixth defendant but as the third defendant in the suit.”

The learned judge accordingly dismissed the plaintiff's suit, and his judgment has been affirmed on appeal by the High Court in its appellate jurisdiction. With regard to the invalidity of Rajaram's acts as affecting the plaintiff's rights, the learned

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judges in the Appellate Court have taken the same view as the first Court, that Rajaram, in entering into the compromise, acted in his personal capacity, which they considered him competent to do as "his appointment as guardian ad litem would not deprive him of his capacity to act on his own behalf." They were further of opinion that "as the money was made payable to him only as the representative of the family of which he is the head, the compromise he entered into will be binding on the other members, including the plaintiff, only if it is a bona fide compromise of a disputed claim."

It seems to their Lordships that there is a fallacy underlying the reasoning on which the Courts below have proceeded. No doubt a father or managing member of a joint Hindu family may, under certain circumstances and subject to certain conditions, enter into agreements which may be binding on the minor members of the family. But where a minor is party to a suit and a next friend or guardian has been appointed to look after the rights and interests of the infant in and concerning the suit, the acts of such next friend or guardian are subject to the control of the Court. Sect. 462 of the Code of Civil Procedure, 1882, expressly provides that "No next friend or guardian for the suit shall, without the leave of the Court, enter into any agreement or compromise on behalf of a minor, with reference to the suit in which he acts as next friend or guardian."

The Courts in India seem to think that because Rajaram was a party to the suit of 1886 and was also guardian ad litem for his minor son, who was a member of the joint family whom Rajaram was representing, it was open to him to enter into the compromise in his personal capacity, and as it was a bona fide settlement of a disputed claim, it became binding on the minor by virtue of his having acted as the managing member of the family. How far the acts of a father or managing member may affect a minor, who is a party to the suit represented by another person as next friend or guardian ad litem, is a question which does not arise in the case, and their Lordships are not called upon to express an opinion on it. But they consider it to be clear that when he himself is the next friend or guardian of the minor his powers are controlled by the provisions of the law, and

he cannot do any act in his capacity of father or managing member which he is debarred from doing as next friend or guardian without leave of the Court. To hold otherwise would be to defeat the object of the enactment.

The learned judges, however, seem to have lost sight of the fact that the agreement which is challenged in this case was entered into by Rajaram not only on his own behalf but also on behalf of his minor son, for whom he was guardian in the suit. Their Lordships are of opinion that, in view of the provisions of s. 462, he had no authority to enter into any compromise or agreement purporting to bind the minor.

In their Lordships' judgment the fact that the moneys were made payable to Rajaram, who was admittedly representing his branch of the family, makes no difference in the duty which lay on him to obtain the leave of the Court to an agreement which was clearly intended to affect the rights and interests of his son.

Their Lordships are of opinion that there should be a declaration in this case that the agreement of November 21, 1897, and the satisfaction entered thereunder are not binding on the plaintiff and that he is remitted to his original rights under the decrees in the suit of 1886.

Their Lordships will, therefore, humbly advise His Majesty that the decree and judgment of the High Court should be set aside, that a declaration should be made in the terms stated, and that the case should be returned to the High Court to deal with the other questions covered by issues Nos. 6 and 7 arising between the parties.

The respondent Tuljaram will pay the costs of the appeal to the High Court in its appellate jurisdiction and the costs of this appeal. The costs of the trial on the original side of the High Court, and those which will be incurred in the future proceedings, will abide the result of those proceedings.

Solicitor for appellant : *Douglas Grant.*

Solicitor for first respondent : *John Josselyn.*

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TEKAIT KRISHNA PRASAD SINGH, MINOR,
BY HIS GUARDIAN LACHMI KUMARI . . . } APPELLANT ;

AND
MOTI CHAND RESPONDENT.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Pratice—Attachment—Death of Judgment Debtor—Minor Son unrepresented—Irregular Sale—Petition by Mother as Natural Guardian—Competency of Appeal—Code of Civil Procedure, 1882, ss. 2, 311, 588 (16.), 594, and 595.

In execution of a decree against the appellant's father, the appellant (a minor) and others, the respondent obtained an attachment against an impartible zamindari the property of the appellant's father. Before the sale the appellant's father died and the zamindari descended to the appellant, who was not represented by any guardian in the attachment proceedings. The respondent purchased at the auction sale. There were irregularities in publishing and conducting the sale whereby the appellant suffered substantial injury. Upon the petition of the appellant's mother on his behalf the Deputy Commissioner made an order setting aside the sale. The High Court reversed this order on the facts and confirmed the sale :—

Held, (1.) that under the Code of Civil Procedure, 1882, s. 595, an appeal lay to His Majesty in Council.

(2.) That under the circumstances the appellant's mother, as his natural guardian, was entitled to petition on his behalf to set aside the sale, and that the order of the Deputy Commissioner was right on the facts.

APPEAL from an order of the High Court (May 18, 1908) reversing an order of the Deputy Commissioner of Hazaribagh (February 16, 1906).

The appellant was a minor and the son of one Birj Behari Singh, deceased. On November 27, 1900, the respondent obtained in the Court of the Subordinate Judge of Benares a decree for Rs. 6,599 against the appellant's father, the appellant and certain other persons. The Nazir of the Court at Benares had been appointed guardian ad litem to the appellant when the suit was filed. The decree was transferred for execution to the Court of the Deputy Commissioner at Hazaribagh, and on May 11, 1903, the respondent applied to that Court for execution of the same by attachment

* *Present* : LORD ATKINSON, LORD MOULTON, SIR JOHN EDGE, and MR. AMEER ALI.

and sale of a property known as Gadi Gandey, an impartible zamindari descending by primogeniture and situated in that district.

On June 11, 1903, an attachment order issued against the property. On July 25, 1903, before the date fixed for the auction sale, the appellant's father died. Thereupon, on the application of the respondent, an order was made for service of the notice of attachment on "the heir of the deceased judgment debtor." The respondent tried to effect service on the Nazir of the Court at Benares, but he refused to accept service, the proceedings having been moved, as above stated, to Hazaribagh, at a considerable distance from Benares. The whole of the proceedings for attachment and sale subsequent to the death of the father were without notice to any one representing the minor appellant. In August, 1903, an application was made on behalf of the minor that his property might be taken over by the Court of Wards. In December, 1903, under an order of the Board of Revenue, which was not before their Lordships, the Court of Wards took possession of part of the minor's property and appointed a manager, but their Lordships and both Courts in India found that the Court of Wards did not at any time take over Gadi Gandey. The auction sale took place on January 2, 1904, and the respondent, who had obtained leave to bid, purchased the estate for Rs. 2,020, he being the only person bidding. Their Lordships found on the facts, which are set out in the judgment, that there were material irregularities in the publication and conduct of the sale within the meaning of the Code of Civil Procedure, 1882, s. 311, and that the appellant had sustained substantial injury thereby. On January 26, 1904, the appellant by his mother petitioned the Court of the Deputy Commissioner to set aside the sale for irregularity.

After certain proceedings and negotiations in which the Court of Wards took some part, the petition came on for hearing on December 5, 1904, when, nobody appearing on behalf of the petitioner, it was dismissed. The Court of Wards had by then finally determined not to take over Gadi Gandey. On the application of the appellant's mother the petition was restored and again came before the Deputy Commissioner on February 15,

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1906. After hearing evidence the Deputy Commissioner on February 16, 1906, delivered judgment in the appellant's favour and made an order setting aside the sale for irregularity. Against this order the respondent appealed to the High Court.

On May 18, 1908, the High Court allowed the appeal and confirmed the sale on the ground that in the opinion of that Court there was no evidence that the appellant had suffered substantial injury as provided by the Code of Civil Procedure, 1882, s. 311.

On September 2, 1908, Lachmi Kumari, described as the appellant's grandmother, applied to the High Court on his behalf for leave to appeal to His Majesty in Council, and the matter was remitted to the Deputy Commissioner for inquiry and report as to the value of the estate the subject-matter of dispute. Certain abortive negotiations followed, and eventually on April 9, 1910, the Deputy Commissioner reported that Gadi Gandey, after the discharge of the incumbrances, was of the value of over Rs. 2,50,000. On this report the High Court on February 7, 1911, granted leave to appeal.

The respondent by petition to His Majesty in Council took objection to the competency of the leave so granted, and this petition was directed by their Lordships to stand over until the hearing of the appeal.

De Gruyther, K.C., and *Eddis*, for the appellant. There were irregularities in the sale both as to the proclamation and as to the fixing of the minimum price whereby the property was sold to the respondent far below its true value. This is a ground for setting it aside under the Code of Civil Procedure, 1882, s. 311 : *Saadatmand Khan v. Phul Kuar*. (1) The appellant was not represented in the attachment and sale proceedings and no notice was served on any one on his behalf. In the circumstances his mother was entitled to petition on his behalf to set aside the sale.

Sir Erle Richards, K.C., and *A. Gray*, for the respondent. The present appeal is not competent. There is no appeal from an order of the High Court confirming or setting aside a sale of irremovable property. By the Code of Civil Procedure, 1882,

(1) (1901) L. R. 25 Ind. Ap. 146.

s. 588, sub-s. 16, these orders are final. It is true that s. 594 in ch. XLV. of that Act enacts that "decree" in that chapter, which deals with appeals to His Majesty in Council, shall include "judgment and order" and that s. 595 gave an appeal from any final decree passed by the High Court. "Decree" is defined by s. 2 as not including "order." "Decree" in s. 595 cannot be extended to include those judgments and orders which s. 588 expressly provides are to be final. When there is an attachment of property during the lifetime of the owner, it is not necessary upon his death before the sale to give notice to the heir. The Code of Civil Procedure, 1882, s. 234, does not apply in that case: *Sheo Prasad v. Hira Lal*. (1) The Code of Civil Procedure, 1908, by s. 50 in substance reproduces s. 234 of the 1882 Act, so that the above decision may be considered as in accordance with the intention of the Legislature. The Court of Wards had absolute authority to deal with the appellant's property and, on the facts, that Court must be taken to have withdrawn the objection to the sale under the Court of Wards Act (IX. of 1879, Bengal), ss. 6, 7, and 9. The appellant's mother had no locus standi to petition on his behalf.

De Gruyther, K.C., in reply. The appeal is competent under s. 595, that section applying to any decision of the High Court which finally disposes of the rights of the parties. In *Sheo Prasad v. Hira Lal* (1) the minor's representative had full knowledge of the proceedings and there was no injury to the minor's interest. The true view is that failure to give notice is a material irregularity, and the representative's right course is to proceed under s. 311 : *Aba bin Khesaji v. Dhondu Bai* (2); *Erava v. Sidram Appa Passare*. (3) The Court of Wards never did take charge of the Gadi Gandey property and they consequently never had in relation to that property the powers given by Act IX. of 1879, s. 9.

The judgment of their Lordships was delivered by

LORD MOULTON. This is an appeal from an order of the High Court of Judicature of Fort William in Bengal, dated May 18, 1908,

(1) (1889) I. L. R. 12 Allah. 440. (2) (1894) I. L. R. 19 Bomb. 276.

(3) (1895) I. L. R. 21 Bomb. 424.

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reversing an order of the Deputy Commissioner of Hazaribagh, dated February 16, 1906, which set aside the sale of a property known as Gadi Gandey, which is an impartible zamindari descending by primogeniture situated in that district.

The prolonged legal proceedings in relation to this matter give rise to many important questions of law, but, in the view taken by their Lordships as to the rights of the parties, it will not be necessary to decide more than one or two of such questions. To appreciate the points necessary to be so decided it will be convenient to state first the facts of the case so far as they relate to the sale and then to deal with the legal proceedings that have been taken with regard to it.

The property originally belonged to the father of the infant appellant, against whom the respondent on November 27, 1900, obtained a decree in the Court of the Subordinate Judge of Benares for Rs. 6,599.9.6 and costs. Two years later this decree was transferred for execution to the Court of the Deputy Commissioner of Hazaribagh, and the respondent applied to that Court for execution of the same by attachment and sale of the property. While these proceedings were going on the appellant's father died. The respondent continued the attachment proceedings, and on October 28, 1903, applied for and obtained the issue of a sale proclamation fixing the sale for January 2, 1904. It does not appear that notice of any of the proceedings in the attachment was served on any person representing the infant.

The property consisted of 109 mauzas or villages, and the order for the proclamation of sale directed that the sale proclamation should be served on each of the mauzas by announcement to the public with beat of drum, and that a copy of the sale proclamation should be fixed at a conspicuous place on each property. What was actually done was as follows. The proclamation was read out without beat of drum in one only of the mauzas and affixed to a tree in that village alone. The evidence as to this is perfectly clear, and it shews not only that no drum was beaten, but that in the record of the proclamation it was originally so stated. That record has subsequently been altered—evidently fraudulently—to make it appear that it was done with beat of drum.

In addition to these serious irregularities there is another, which, as it appears on the documents, their Lordships consider that they are entitled and bound to notice. The schedule of the property attached to the proclamation ought to have contained the particulars set out in s. 287 of the Code of Civil Procedure, 1882. As a matter of fact it contained no statement of the incumbrances to which the property was liable. It stated the annual profit income to be Rs. 4,953.7.3, and then stated the value as being Rs. 2,000. To this last matter their Lordships attach importance, because the permission to bid which the decree-holder obtained from the Court was subject to the condition that the sale should not take place below the estimated value, and inasmuch as their Lordships are of opinion on the evidence that this was a gross undervaluation, their Lordships cannot doubt but that the decree-holder had procured the insertion of this valuation (which corresponded to the amount due to the Government in respect of unpaid taxes, &c.) for the purpose of making possible a purchase by him at this low figure.

What happened on the occasion of the sale is what might have been expected. With the exception of the Collector and the decree-holder no bidder was present. The Government bidding was Rs. 2,000, the amount due for taxes, &c., from the property. The decree-holder then bid Rs. 2,020 and the property was of course knocked down to him.

Their Lordships have no doubt whatever that the matters above referred to constitute material irregularities in the publishing and conducting the sale within the meaning of s. 311 of the Code of Civil Procedure, 1882. There is abundant evidence that the infant appellant sustained substantial injury through such irregularities. The evidence of Moulvi Syed Ejabat Hossain, who was a manager under the Court of Wards, and who had occasion to examine into the property shortly subsequent to the sale, shews that in his opinion the property was sufficiently valuable to pay all the debts due to the judgment creditors. At a later stage of the proceedings it became necessary to ascertain the value of the property and the amount of the incumbrances thereon, and the Court referred the matter to a special referee. He heard evidence on both sides and

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reported that the property was worth more than two lakhs of rupees after allowing for all the incumbrances. Against this evidence nothing has been cited to shew that the valuation on the sale proclamation was a fair one or that the price obtained was adequate. It is true that counsel for the respondent called their Lordships' attention to a letter written in the course of certain negotiations for a compromise, in which it would appear that some official of the Court of Wards was not prepared to advise that a sum of Rs. 9,000 should be paid to get rid of the sale unless the estate (which was no doubt heavily incumbered) could be wound up with the assistance of the Chota Nagpur Incumbered Estates Act, 1876. But the statements in such letter, even if they supported the contention of the respondent, would not be evidence unless the writer were called and his source of information disclosed. As it stands it is merely an expression of opinion by a person who, presumably, had no personal knowledge of the matter, and this can have no evidential value. Even if accepted it would point to the property being of a value of more than four times the sum which the decree-holder paid for it under the sale in question.

The above facts establish a clear case for setting aside the sale. The sole question, therefore, is whether the legal proceedings for setting aside the sale have been regular so that their Lordships have jurisdiction to give the relief prayed for in this appeal.

For the purposes of this part of the case it will be necessary to give in some detail an account of the legal proceedings that have taken place in the matter. The original action was in the Court of the Subordinate Judge of Benares. In 1903 the suit was remitted to the Court of the Deputy Commissioner at Hazaribagh for the purpose of execution, and on June 11, 1903, he issued an attachment order against the property. The decree-holder applied for the issue of a sale proclamation which for some reason was ineffective. A fresh sale proclamation was then applied for which was directed to issue fixing September 1 for the sale. The report relating to the service of this sale proclamation was submitted on August 6. In the meantime the judgment debtor had died on July 27, 1903. At that date an order had been made for the issue of a sale proclamation for

sale on September 1, but the sale proclamation had not been served. On July 30 the decree-holder applied for the issue of notice on the heir of the deceased judgment debtor, and the record states that an order was made for that issue, but there is nothing to shew that anything was done under it. It is probable that the decree-holder tried to effect service on the Nazir of the Court of Benares, but that the latter refused to accept it. The sale could not be held under the sale proclamation for September 1, 1903, and the decree-holder applied for the issue of a fresh one on September 7 and obtained the issue of a sale proclamation fixing the sale for November 2. The service of this sale proclamation was, however, irregular, and on October 28 he applied for and obtained one fixing the sale for January 2, 1904. Subsequently he obtained permission to bid at the sale, but such permission was coupled with the condition that the sale should not take place below the estimated price. This permission was only obtained on the day of the sale, and on that day he purchased the property for Rs. 2,020.

It would appear that the whole of the proceedings subsequent to the death of the appellant's father were without notice to any one representing the infant. It is true that in the original proceedings in the local Court of Benares, in the lifetime of his father, he and three other minors were added as defendants, and the Nazir of that Court was appointed pro forma guardian to them for the purposes of the suit. When, however, the proceedings were transferred to the Court of the Deputy Commissioner of Hazaribagh, it was obviously impossible for him to act in this capacity, and he refused so to do. From and after the death of the judgment debtor and down to the time of the actual sale there was, therefore, no effective representative of the infant heir. On the day of the sale Narayan Kumari, the mother of the infant, applied for a postponement, but it was refused, and on January 26, 1904, she, as the natural guardian of the infant and on his behalf, presented a petition for setting aside the sale, alleging adequate grounds for so doing. The proceedings on this petition continued for some months. At this date the Court of Wards had taken possession of some portion of the infant's property (but not of Gadi Gandey), and the mother of the infant

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tried to induce them to intervene with regard to the sale. This led to proceedings in the Court which are difficult to understand. The Deputy Commissioner appears to have provisionally invited the manager of another portion of the infant's property to appear and file objections to the sale of Gadi Gandey, and for some time it was doubtful whether or not the Court of Wards would take charge of that property ; and, if so, whether they would intervene in the legal proceedings, or would take steps to bring about a compromise with the decree-holder. But all this ultimately came to nothing, and on December 5, 1904, finding that the Court of Wards did not appear at the hearing fixed for that date, the Deputy Commissioner made an order confirming the sale.

The mother of the infant who had presented the petition only learnt of the making of this order after the event. She was in ignorance that the Court of Wards had declined to interfere in the matter. On learning what had happened she presented a petition for a review of the order confirming the sale and praying to have it set aside. After protracted proceedings, for the purpose chiefly of taking the necessary evidence, the Deputy Commissioner on February 16, 1906, allowed the prayer of the petition, having previously decided that sufficient cause had been shewn to justify the delay in presenting it. From this decision an appeal was brought to the High Court of Judicature at Fort William. That Court set aside the decision of the Deputy Commissioner, and from that decision the present appeal is brought.

The first contention against the competency of this appeal is based on the provisions of ch. XLV. of the Code of Civil Procedure, 1882, which was in force at the date of the appeal. This chapter regulates appeals to the King in Council. Sect. 594 provides that in that chapter the expression "decree" includes also "judgment" and "order" unless there be something repugnant in the subject or context. But it is argued that orders for confirming or setting aside a sale made under ss. 311 and 312 are nevertheless excluded from the expression "decree" in this chapter, because they are included in the orders mentioned in s. 588. The reasoning is as follows : In the definition of

"decree" in s. 2 "orders" specified in s. 588 are not included in the word "decree." Moreover s. 588 provides that "the orders passed in appeal under this section shall be final." It is therefore contended that it would be repugnant to give to the word "decree" in ch. XLV. a meaning which would include "orders" under s. 588. "Orders" setting aside or refusing to set aside sales of immovable property are therefore not appealable to the King in Council.

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Their Lordships are unable to accept this contention. The Code in express terms adopts for the purposes of ch. XLV. a definition of "decree" which is special and differs from the meaning that it bears elsewhere in the Act. The definition of "decree" in s. 2 is therefore not applicable, and the word "decree" in this chapter must be read as equivalent to "decree judgment or order." As so read there is no difficulty in construing s. 595, which determines when an appeal lies to the King in Council. If this substitution be made it is evident that final orders may be appealed against, and therefore the provision at the end of s. 588 providing that orders passed in appeal under that section shall be final cannot restrict the provision that appeals may be brought to the King in Council from them. It should be added that appeals of this nature have frequently been heard by this Board in times past, so that the consistent practice of the Board is at variance with this contention of the respondent. Moreover no reason can be given why orders of so important a character as those made under ss. 311 and 312, which deal finally with the rights of parties, should be excluded from the privilege of an appeal.

But the main contention of the respondent was to the effect that the mother of the infant could not represent him in these proceedings. It is so obvious that the Nazir of the local Court of Benares did not in fact represent the infant during any portion of the proceedings in the Court of Hazaribagh that neither before their Lordships nor in the Courts below was there any substantial contention that he continued to represent the infant after the removal of the proceedings to that Court. But it was contended that the only representative of the infant at the time of the sale and subsequently was the Court of Wards. It appears that on

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December 23, 1903, the Court of Wards made an order taking over the management of some part of the property of the infant. That order was not in evidence, and there is nothing in the record which enables their Lordships to ascertain its terms, but it is clear that the Court of Wards did not in fact take over Gadi Gandey at any time. There are concurrent findings to this effect in the Courts below and their Lordships have independently arrived at the same conclusion. Their Lordships are therefore of opinion that inasmuch as the interests of the infant with regard to this property were not in fact represented by the Court of Wards it was open to the mother as natural guardian to appear in the name of the infant to protect this property from sale, and that it was the only way of preventing his interests with regard thereto being sacrificed. The proceedings taken by her were therefore in order and the appeal from them is properly before their Lordships.

Their Lordships will therefore humbly advise His Majesty that the appeal be allowed and the order of the High Court be discharged with costs and the order of the District Commissioner restored, and that the respondent be ordered to pay the costs of this appeal.

Solicitors for appellant : *Dallimore, Pilbrow & Co.*

Solicitors for respondent : *Watkins & Hunter.*

RAJA DEBI BAKHSH SINGH PLAINTIFF ; J. C.*
 AND
 HABIB SHAH DEFENDANT. 1913
April 16, 29.

ON APPEAL FROM THE JUDICIAL COMMISSIONER OF OUDH.

Practice—Death of Sole Plaintiff before Trial—Dismissal of Suit for Non-appearance—Jurisdiction to set aside Dismissal—Making Legal Representative Plaintiff—Limitation—Code of Civil Procedure, 1908, Order IX., rr. 8 and 9 ; Order XXII, r. 3—Limitation Act, 1908, Sched. I., arts. 163 and 176.

When a sole plaintiff dies before the hearing of the suit and the suit is dismissed for non-appearance there is inherent jurisdiction in the Court to set aside the dismissal, and this is expressly preserved by the Code of Civil Procedure, 1908, s. 151. Order ix., rr. 8 and 9, do not apply in these circumstances, and the legal representative can apply under Order xxii., r. 3, to be made a party within six months of the death under the Limitation Act, 1908, Sched. I., art. 176.

APPEAL from a judgment and decree of the Court of the Judicial Commissioner of Oudh (December 7, 1911) affirming in review a judgment and order of that Court (February 20, 1912) reversing an order of the Deputy Commissioner of Bahraich (September 11, 1911).

Raja Muneshar Bakhsh Singh, father of the appellant, instituted a suit against the respondent for recovery of arrears of rent under a lease and filed his plaint on May 3, 1911, in the Court of the Deputy Commissioner of Bahraich. The respondent filed his written statement on May 31, 1911.

On June 21, 1911, Raja Muneshar Bakhsh Singh died.

The suit was fixed for hearing on July 4, 1911, and on that day, the plaintiff not appearing, the suit was dismissed.

On August 3, 1911, the appellant applied that the order dismissing the suit might be set aside and that he might be substituted for his father as plaintiff.

On August 3, 1911, the agent of the appellant left this application with the general superintendent of the Court of the

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Deputy Commissioner, stating that he was waiting in Court from 2 P.M. to 4-30 P.M. to present the application, but that he was unable to do so, as the Deputy Commissioner had not taken applications on that date. The Deputy Commissioner on August 4, 1911, ordered : "he was in my Court and might have filed it then. It may be accepted." The application purported to be made under the Code of Civil Procedure, 1908, Order XXII., r. 3, and Order IX., r. 9.

At the hearing of the application on September 11, 1911, the respondent contended that no report of succession had been made under the provisions of the Land Revenue Act (III. of 1901, U. P.), s. 34 (5). also that the application could not be taken as being made before August 4, 1911, and that it was therefore time-barred by the Limitation Act, 1908, Sched. I, art. 163. The appellant contended that the period of limitation was six months under Sched. I., art. 176, of that Act. The Deputy Commissioner granted the application; he stated that the report of the succession required by the Land Revenue Act had been made, and he held that the application had been accepted on August 3, 1911, under his order. He added : "I cannot allow any technicality to obscure the fact that the case was not heard only because of the calamity which prevented it being put up."

On the respondent's application to the Court of the Judicial Commissioner this order was reversed. That Court considered that Act III. of 1901, s. 34 (5.), had not been complied with, no report being in the record; also that the application under Order IX., r. 9, had to be made within thirty days of the dismissal, and that it was not effectively made on August 3, 1911, and was therefore out of time.

The appellant applied to the Court of the Judicial Commissioner to review this decision on the ground that the dismissal of the suit under Order IX., r. 8, was ultra vires, and that the inherent jurisdiction of the Deputy Commissioner to set aside his dismissal of the case was preserved by the Code of Civil Procedure, 1908, s. 151, and that no effect had been given to Order XXII., r. 3.

On February 20, 1912, the Court of the Judicial Commissioner delivered judgment by which they rejected these contentions,

affirmed their decision of December 5, 1911, and dismissed the application.

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De Gruyther, K.C., and *Kyffin*, for the appellant. Where a sole plaintiff dies before trial, Order IX., r. 8, does not apply. The suit was dismissed in ignorance of the fact that the plaintiff was dead, and the Deputy Commissioner had inherent jurisdiction to set aside the order dismissing it. That inherent jurisdiction is preserved by the Code of Civil Procedure, 1908, s. 151. By Order XXII., r. 1, it is provided that the death of the plaintiff shall not cause the suit to abate if the right to sue survives, and the appellant, as the legal representative, properly applied under r. 3 of that order to be made a party. Whether the application was effectively made on August 3 or 4, it was in time, for the Limitation Act, 1908, Sched. I., art. 176, makes six months the limitation period for this application. It is true that art. 163 of that schedule makes thirty days the period within which an application under Order IX., r. 9, has to be made, but no such application was necessary, the suit having been dismissed after the death of the plaintiff. The Deputy Commissioner found as a fact that the order of succession required by Act III. of 1901, U. P., s. 34 (5.), had been made; it was not in the record because this fact was not challenged.

The respondent did not appear.

The judgment of their Lordships was delivered by

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April 29.

LORD SHAW OF DUNFERMLINE. The appellant's father, Raja Muneshar Bakhsh Singh, instituted a suit against the respondent for payment of sums amounting to Rs. 15,908. The plaint was filed on May 3, 1911, in the Court of the Deputy Commissioner of Bahraich. The respondent filed his written statement on May 31, 1911. On July 4 the following occurred before the Deputy Commissioner:—"On the case being called to-day the plaintiff was not present. I therefore dismiss the claim. Costs upon plaintiff."

The fact, unknown to the Deputy Commissioner, was that the plaintiff was dead. He had died about a fortnight before, namely, on June 21. It is plain to their Lordships that, upon

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this being pointed out, it was the duty of the Deputy Commissioner to rectify the situation. This duty Mr. Clarke, the Deputy Commissioner, seems fully to have recognized. It requires no words of their Lordships to shew the inapplicability of rules or orders dealing with the case of the non-appearance of a suitor to the situation which arises when the suitor is dead. The principle of forfeiture of rights in consequence of a default in procedure by a party to a cause is a principle of punishment in respect of such default, but the punishment of the dead, or the ranking of death under the category of default, does not seem to be very stateable.

The deceased plaintiff's son took the proper steps to have his name substituted in place of his deceased father under Order XXII., r. 3, of the Civil Procedure Code. He did so on August 3, which was well within the period of six months' limitation under art. 176 of the First Schedule of the Indian Limitation Act of 1908. Some question arose as to the application being time-barred, but the latter was very properly accepted by Mr. Clarke. The appellant had also taken the proper steps to have a report of his succession made under s. 34 of the Land Revenue Act, 1901.

On September 11, 1911, the Deputy Commissioner pronounced the following order:—"The case was dismissed as no one appeared on the previous hearing. This was due to the death of the Raja of Mallanpur. The other side claim that the re-hearing is barred under s. 34 of the Rent Act, but that section clearly requires a report of the succession, which has already been made. It is argued that the application is time-barred, but it was filed and accepted under my order within time. But I cannot allow any technicality to obscure the fact that the case was only not heard because of the calamity which prevented the applicant putting up this case. Under these circumstances I accept this application, and fix 27th October for hearing of issues, if necessary, and proof."

This order by the Deputy Commissioner is so manifestly sensible and correct that their Lordships are of opinion that it ought to be reverted to, and the case proceeded with accordingly.

On October 5, 1911, however, the Court of the Judicial Commissioner of Oudh reversed the Deputy Commissioner's order, and on February 20, 1912, on review, that judgment was affirmed. In their Lordships' opinion these judgments cannot stand, being vitiated by applying to a dead man orders and rules applicable to a defaulter. By the Code of Civil Procedure, s. 151, it is provided that "nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice, or to prevent abuse of the process of the Court." In their Lordships' opinion such abuse has occurred by the course adopted in the Court of the Judicial Commissioner. Quite apart from s. 151, any Court might have rightly considered itself to possess an inherent power to rectify the mistake which had been inadvertently made. But s. 151 could never be invoked in a case clearer than the present, and their Lordships are at a loss to understand why, apart from points of procedure and otherwise, it was not taken advantage of.

Their Lordships have humbly advised His Majesty that the appeal be allowed, the order appealed from set aside and the order of the Deputy Commissioner of September 11, 1911, restored, and that the appellant be found entitled to the costs of the proceedings since August 3, 1911, in India, and to the costs of this appeal. The suit will be remitted to India to be disposed of on the merits.

Solicitors for appellant : *T. L. Wilson & Co.*

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J. C.* CHIMAN LAL (REPRESENTATIVE OF JIWAN MAL) APPELLANT;

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AND

April 8, 15 ; HARI CHAND RESPONDENT.
May 2.

ON APPEAL FROM THE CHIEF COURT OF THE PUNJAB.

*Adoption—Agarwal Banias of Zira—Custom at variance with Hindu Law—
Evidence of Custom—Concurrent Findings.*

The Chief Court and the Divisional Judge having found that the Agarwal Banias of Zira do not in matters of adoption follow the general rule of Hindu law, but that by the custom applicable to them an unequivocal declaration of adoption followed by treatment of the person (in this case an orphan and a married man) as an adopted son is sufficient to constitute a valid adoption,—

Held, that the evidence, as between the parties to the suit and those claiming through and under them, was sufficient to justify the finding, but that the case would not be a satisfactory precedent if in any future suit between other parties fuller evidence with regard to the custom should be forthcoming.

APPEAL from a judgment and decree of the Chief Court of the Punjab (April 6, 1908) affirming a judgment and decree of the Divisional Judge, Ferozepore (October 14, 1904), which affirmed a judgment and decree of the District Judge, Ferozepore (March 23, 1903).

The appeal arose out of a suit brought by the respondent against his uncle Jiwan Mal, now represented by the appellant, another nephew. The suit was for a declaratory decree that the plaintiff (respondent) was the adopted son of Jiwan Mal. The parties were Hindus and Agarwal Banias of Zira, and the plaintiff was an orphan and a married man at the time of the alleged adoption.

The District Judge made a decree as claimed. On appeal the Court of the Divisional Judge at Ferozepore on July 10, 1903, remanded the case under s. 566 of the Code of Civil Procedure, 1882, for an inquiry into the question whether the parties were governed by Hindu law or by custom, and if by custom, whether the adoption as alleged to have taken place was valid under the

* *Present* : LORD SHAW OF DUNFERMLINE, LORD MOULTON, SIR JOHN EDGE, and MR. AMEER ALI.

custom prevailing among the Agarwal Banias of Zira. The District Judge appointed the Tahsildar of Zira to make a local inquiry and to record such evidence as the parties adduced. The Tahsildar heard and recorded evidence and added a report in which he recorded his opinion against the alleged custom and adoption.

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Upon the case again coming before the Divisional Judge, he, on October 14, 1904, gave judgment for the plaintiff, stating that "from the evidence produced by the parties it is proved beyond a shadow of doubt that as far as adoption is concerned the parties do not follow Hindu law but are governed by custom," and further that "the plaintiff was adopted by the defendant Jiwan Mal as his son according to the custom prevailing among the Agarwal Banias of Zira." The appeal was accordingly dismissed. Upon the application of the defendant the Chief Court admitted the case for revision under the Punjab Courts Act (XVIII. of 1884), s. 70 (a) and (b), and after argument gave judgment on May 14, 1907, setting aside the judgment of the Divisional Judge and dismissing the suit.

The respondent having obtained an order for review of this decision, under s. 623 of the Code of Civil Procedure, 1882, the case was re-argued before the same Bench as had heard the original appeal. By their judgment of April 6, 1908, the Chief Court set aside their former decision and upheld the decision of the Divisional Judge in favour of the plaintiff.

Sir R. Finlay, K.C., and *Ross, K.C.*, for the appellant. The evidence clearly established that with regard to adoption the Agarwal Banias are governed by Hindu law, save in so far as it is varied by custom. There was no finding of fact, and no evidence, that there is a custom overriding the principle of the Hindu law of adoption in so far as it renders impossible the adoption of an orphan and of a married man. The evidence did not shew an unequivocal intention to adopt the respondent. On the contrary it was proved that Jiwan Mal treated both his nephews, the appellant and the respondent, alike. If one was adopted according to the alleged custom, so was the other, and it is not suggested that a double adoption could be made. The

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 appeal is competent even if "no substantial question of law is involved" within s. 596 of the Code of Civil Procedure, because the Chief Court certified under s. 595 (c), to which sub-section 596 does not apply. In any case, however, the question of the capacity of the person to be adopted as distinguished from the fact of adoption is a question of law. For these reasons the decisions in *Karuppanan Servai v. Srinivasan Chetti* (1) and *Mirza Sajjad Husain v. Nawab Wazir Ali Khan* (2) do not apply.

De Gruyther, K.C., and *O'Gorman*, for the respondent, were not called upon.

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 May 2.
 The judgment of their Lordships was delivered by
 SIR JOHN EDGE. The suit in which this appeal has arisen was brought on January 12, 1901, in the Court of the District Judge of Ferozepore by Hari Chand, who is the respondent here, against Jiwan Mal, now dead, who is represented by Chiman Lal, the appellant. In this suit Hari Chand sought a declaration that he was the adopted son of Jiwan Mal, the then defendant. In his written statement Jiwan Mal alleged that he had never adopted Hari Chand.

Hari Chand and Jiwan Mal were Hindus, and Agarwal Banias, of Zira, in the Punjab. Hari Chand was one of the four sons of Ghannu Mal, who was a brother of Jiwan Mal. Chiman Lal, the appellant here, was a son of Maya Mal, who was another brother of Jiwan Mal. At the time of the alleged adoption Hari Chand was an orphan and was married. No issue was framed by the District Judge as to whether the parties were governed by Hindu law or by custom, or as to the validity of the adoption if it, in fact, were made. The District Judge held that in the Punjab "Non-agricultural Hindus do not, in matters of adoption, follow Hindu law, and there seems no reason to doubt that a declaration of adoption, together with treatment in accordance with the avowed intention, would be sufficient to establish the validity of an adoption, even though the position of the adopted son were inconsistent with the strict requirements of Hindu law."

(1) (1901) L. R. 29 Ind. Ap. 38.

(2) (1912) L. R. 39 Ind. Ap. 156.

The District Judge found that Jiwan Mal had, in fact, adopted Hari Chand, and on March 23, 1903, gave the plaintiff a decree.

From the decree of the District Judge Jiwan Mal appealed to the Court of the Divisional Judge of Ferozepore. The Divisional Judge, on July 10, 1903, remanded the suit to the Court of the District Judge to give the parties the opportunity of proving or disproving the validity of the adoption. On the return to the order of remand the Divisional Judge found, as a fact, that the parties were governed in cases of adoption by customary law, and that in the caste to which the parties belonged "a mere declaration to the effect that a boy has been adopted and his subsequent treatment as a son are sufficient for all intents and purposes to make the adoption a valid one," and further found on the evidence that Hari Chand had been adopted by Jiwan Mal as his son according to the custom prevailing among the Agarwal Banias of Zira. The Divisional Judge by his decree of October 14, 1904, dismissed the appeal.

From the decree of October 14, 1904, of the Divisional Judge Jiwan Mal appealed to the Chief Court of the Punjab. The learned judges of the Chief Court on appeal carefully reviewed the evidence in the case, and, holding that Jiwan Mal had unequivocally designated Hari Chand as his heir and had treated him as his adopted son, found that the factum of adoption was proved. On the question of the validity of the adoption the learned judges found that the Agarwal Banias of Zira did not follow Hindu law in matters of adoption, and observed that "the really important thing is the unequivocal intention and treatment, and we find both proved here." The Chief Court by its decree dismissed the appeal.

From the decree of the Chief Court of the Punjab dismissing the appeal to that Court this appeal has been brought. In this appeal it has been contended on behalf of the appellant, so far as is material, that Jiwan Mal did not in fact adopt Hari Chand as his son, and that the alleged adoption was invalid according to Hindu law. Their Lordships consider that the Chief Court and the Divisional Judge have concurrently found that among the Agarwal Banias of Zira the general rules of Hindu law as to

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adoptions do not apply, and that by the custom applicable to the Agarwal Banias of Zira an unequivocal declaration by the adopting father that a boy has been adopted and the subsequent treatment of that boy as the adopted son is sufficient to constitute a valid adoption; and that in fact Jiwan Mal did unequivocally adopt Hari Chand as his son and treated him as his adopted son. Of the fact of the adoption and treatment there was ample evidence upon which the judges of the Chief Court and the Divisional Judge could find as they did. The evidence upon which it was found that the Agarwal Banias of Zira do not in matters of adoption follow the general rules of Hindu law, and that by the custom applicable to them an unequivocal declaration of adoption followed by subsequent treatment of the person as an adopted son is sufficient to constitute a valid adoption, appears to their Lordships to have been somewhat limited, but their Lordships consider that as between the parties to this suit and to this appeal, and those claiming through or under them, that evidence was sufficient to entitle the Chief Court and the Divisional Judge to find that the adoption was valid. Their Lordships, however, consider that the present case, owing to the limited nature of the evidence as to custom among the Agarwal Banias of Zira, would not be a satisfactory precedent if in any future instance among other parties fuller evidence regarding the alleged custom of the Agarwal Banias of Zira should be forthcoming. The contention that Chiman Lal had also been adopted by Jiwan Mal is not established by the evidence before this Board.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed and that the decree of the Chief Court of the Punjab should be affirmed. Chiman Lal, the appellant, must pay the costs of this appeal.

Solicitors for appellant : *Hartcup & Davis.*

Solicitors for respondent : *T. L. Wilson & Co.*

BRIJRAJ SINGH AND ANOTHER DEFENDANTS ;
 AND
 SHEODAN SINGH AND OTHERS PLAINTIFFS.

J. C.*

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April 16, 17 ;
 May 5.

AND CONSOLIDATED CROSS-APPEAL.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Hindu Joint Family—Partition—Family Arrangement—"Will"—Record of Arrangement—Reservation of Right to Cancel—Mutation of Names—Evidence of Consent.

The head of a joint Hindu family, being old and infirm, in September, 1895, divided substantially the whole of the joint family property between his three sons and his wife, putting them into possession and retaining no share for himself. In November, 1895, he executed a document, called therein a will, in which he stated that he had made this division, naming the villages. The document ended with this clause : "If I at any time come back from pilgrimages and find mismanagement or character of any one bad, then I shall have power to cancel this will which shall be enforced from the date of its execution." Mutation of names in accordance with this division took place with the consent of all parties, and suits for rent were brought by the sons in their own names severally. In 1905 a partition suit was commenced by the younger sons :—

Held, that there was overwhelming evidence that the plaintiffs consented to the family arrangement as a partition, that the above clause of the document of November, 1895, if it had any operative effect, was insufficient to outweigh that evidence, and that the suit should be dismissed.

CONSOLIDATED APPEALS from two decrees and judgments of the High Court (May 17, 1910) partly affirmed and partly reversing a decree and judgment of the Court of the Additional Subordinate Judge at Aligarh (September 30, 1907).

The plaintiffs in the suit were the second and third sons, and their respective only sons, of one Rao Balwant Singh ; the defendants were the only son of Rao Balwant Singh's eldest son and Rao Balwant Singh's widow. In the first appeal the appellants were the defendants in the suit, and the respondents were the plaintiffs, excepting the second son, who died after the hearing before the Subordinate Judge.

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By their plaint dated September 13, 1905, the plaintiffs claimed a declaration that certain villages, houses, and movable property were joint family property, and prayed for partition. The defendants by their written statement pleaded (*inter alia*) that the family property had been partitioned in 1895, as was evidenced by a document dated November 26, 1895, and that this partition had been agreed to by all parties at the time and since had been continuously acted on by them.

The facts were shortly as follows. In 1895 Rao Balwant Singh, the head of a joint Hindu family, made a division of the ancestral family property, excepting, however (as their Lordships found), two houses and certain movable property, between his three sons and his eldest son's wife. He installed his eldest son on the gaddi in his place, and by September, 1895, he divided the whole joint property, with the above exception, in the manner set out in the document presently referred to, and put his sons into possession. The property allotted to the eldest son was considerably greater than that allotted to the younger sons, this being alleged to be in accordance with the custom of the family and so found by the Subordinate Judge.

On November 26, 1895, Rao Balwant Singh executed a document, described therein as a will, in which he said: "I have been ill for the last three or four years and am unable to move about. The work in connection with my estate is conducted through Chiranji Lal, general attorney, and Rao Sultan Singh, my eldest son. Now I intend to sever my connection from the world, go on pilgrimages, and visit other countries. Life is transient and uncertain. My three sons are at present fully qualified to conduct the business. Therefore to avoid a dispute after my death I have at present, while in a sound state of body and mind and of my own free-will and accord, divided the property among my sons, heirs, as follows." There followed a specific division of the villages by name among the three sons. The document then gave certain sir lands and other property to his wife for her life, and provided that upon her death it should descend to the wife of one of the plaintiffs and to the sons of the executant's three sons. The document concluded in the following terms: "If I at any time come back from pilgrimages and find

mismanagement or character of any one bad, then I shall have power to cancel this will which shall be enforced from the date of its execution. All three sons were put into separate possession of the estate in the beginning of the year 1303 Fasli (September, 1895). I have no other heir having a right besides those mentioned in this will. I have therefore executed this will in order that it may serve as evidence."

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On February 25, 1896, the plaintiffs, the second and third sons of Rao Balwant Singh, filed applications for mutation of their names in the revenue papers, and stated therein that their father "had partitioned the whole of his property among his heirs under a registered will dated November 26, 1895." The Tahsildar heard the application on March 19, 1896, and his record stated that the application was verified by Rao Balwant Singh, that a transfer of possession had taken place, and that no objection was raised. He accordingly made an order for mutation of names. Rao Balwant Singh died on April 7, 1901, his eldest son, the father of the first defendant, having died a few days earlier. In July, 1901, the defendant, the widow of Rao Balwant Singh, applied on behalf of the defendant their eldest son for mutation of names with regard to the property held by her late husband. From the record of this application, which was granted, it appeared that the plaintiffs, the younger brothers, were present, and made written statements in support of the mutation referring to the will. There also took place a mutation of names in respect of the sir lands.

During the ten years which elapsed between the division of the property and the commencement of the suit the parties each remained in possession of their respective allotted shares of the estate. During this period suits were instituted by the sons, each in his own name, against tenants of their respective recorded shares. At the trial the plaintiff the second son did not give evidence; the plaintiff the third son gave evidence, but he did not deny the above facts or offer any explanation of why proceedings were not taken sooner. The plaintiffs relied on the evidence of Chiranji Lal, the general agent and attorney of Rao Balwant Singh. He produced account books purporting to shew

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that, both during the life of Rao Balwant Singh and since his death, the entire property was jointly enjoyed. Their Lordships agreed with the finding of the Subordinate Judge that these books contained discrepancies and were fabricated by Chiranji Lal. This witness admitted that he had kept a separate book of account in which were recorded the receipts from the particular villages allotted to the plaintiff the third son, and his separate expenditure, and that this book contained a statement in the witness's writing that these villages belonged to that plaintiff. There was a conflict of evidence as to how far Rao Balwant Singh, after the execution of the document of November 26, 1895, retired from the world and ceased to participate in the management of the family property.

The Subordinate Judge by his judgment delivered on September 30, 1907, held that Rao Balwant Singh by the document of November 26, 1895, made a final disposition of the villages in suit, and that the sons having consented to the distribution when it was made, and having afterwards acted in conformity with it for many years, were bound by it as a partition. He found that the family custom under which the eldest son took a larger share was proved and that the account books relied on by the plaintiffs were fabricated. He, however, held that two houses and the movable property were not included in the partition. He accordingly dismissed the claim as to the zamindari villages and sir lands and allowed it as to the two houses and movable property.

Both parties appealed to the High Court. That Court by its judgment (Sir J. Stanley C.J. and Griffen J.), delivered on May 17, 1910, allowed the plaintiffs' appeal and dismissed that of the defendants. They held that the document of November 26, 1895, was an ordinary will operative only from death and was not a family arrangement. Both parties appealed.

De Gruyther K.C., and *Dube*, for the appellants (defendants). The evidence shews conclusively that there was in 1895 a family arrangement under which the family property was partitioned. The plaintiffs consented to the partition then made and have continuously acted on it since. They cannot now be heard to

say that it was unequal or invalid according to Hindu law : *Balkishen Das v. Ram Narain Sahu* (1) ; *Musammatt Parbati v. Chaudhri Naunihal Singh* (2); *Raghubir Singh v. Moti Kunwar* (3) The custom of the family under which the eldest son took a larger share was proved ; in any case it was part of the family arrangement and assented to as part of the agreed partition. The High Court took a wrong view of the object and intention of the document of November, 1895. Although it is called a "will," it was intended to be a record of partition actually made, as appears from its terms.

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A. Grey and Lowndes, for the respondents (plaintiffs). There was no valid partition in 1895. What then took place was not intended as a final and complete partition. In any partition of the ancestral family property the respondents were entitled to claim an equal share : Mayne's Hindu Law, 7th ed., p. 659. The mutation proceedings did not amount to a transfer nor to an estoppel : *Muhammad Imam Ali Khan v. Sardar Husain Khan*. (4) Before a man can be held to have given by his conduct an implied consent to a transaction which amounts to a conveyance it must be shewn that he was fully aware of what the transaction was and what effect it would have on his interests : *Jugo Bundhoo Tewaree v. Kurum Singh*. (5) Conduct which might amount to an admission as to the legal effect of a transaction is not an admission of "a thing" within the meaning of the Evidence Act (I. of 1872), s. 115 : *Jagwant Singh v. Silan Singh*. (6) The document of November, 1895, was intended to be what it is described as, namely, a will. It was not intended to have effect as a partition in præsentia, as appears from the clause by which a right to cancel the arrangement was reserved.

De Gruyther, K.C., in reply. The decision in *Muhammad Imam Ali Khan v. Sardar Husain Khan* (4) as to the effect of a mutation of names is distinguishable. The estate in that case was not an ordinary estate under the Hindu law, but was governed by the Oudh Estates Act, 1869. The mutation proceedings are relied

(1) (1903) L. R. 30 Ind. Ap. 139.

(2) (1909) L. R. 36 Ind. Ap. 71.

(3) (1912) I. L. R. 35 Allah. 41.

(4) (1898) L. R. 25 Ind. Ap. 161.

(5) (1874) 22 Suth. W. R. 341.

(6) (1899) I. L. R. 21 Allah. 285.

J. C. on here as strong evidence that the division in 1895 was intended
 1913 by all parties to be final.

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May 5.

The judgment of their Lordships was delivered by

LORD MOULTON. This is a suit brought by two brothers, Rao Karan Singh and Kunwar Sheodan Singh (with whom are joined as plaintiffs their respective sons Kunwar Shibraj Singh and Kunwar Ranbir Singh), against the widow and son of their eldest brother Rao Sultan Singh, claiming a partition of certain properties which they allege to be the joint and undivided property of the family to which they belong, in which they are entitled to a two-thirds share. The defence is that the properties originally belonging to the family were the subject of a division by a family arrangement made and acted upon in 1895 during the lifetime of the father of the plaintiffs, and that thenceforward the properties ceased to be held jointly, and that those properties of which the defendants are in possession came to them under that family arrangement and became and still remain their separate property.

The principal subject of dispute is village property. But the suit relates also to certain other property, as to which different considerations arise. It will be convenient in the first instance to determine the questions in issue so far as they relate to the village property only and to consider subsequently the effect of the facts thus found on the rights of the parties in respect to the other property.

It will be seen from the foregoing that the real issue in the case is whether or not the alleged family arrangement was in fact made and assented to by the parties interested. The defendants' contention in this respect is exceptionally clear and precise. It leaves no doubt as to the terms of the arrangement even in the minutest details, and is equally definite as to the date when and the circumstances under which it was made.

The father of the three brothers was Rao Balwant Singh. In 1895 he was the head of the family which was then joint and undivided. The village property under his management, and to which this case relates, has been held by the Court of first instance to have been ancestral property, and that finding is

acquiesced in by the parties. He was at that date in advanced years and indifferent health, and determined to free himself from the labours of business and devote the remainder of his life to pilgrimages and travel in other countries. Accordingly, on November 26, 1895, he drew up and executed a document (which he calls a will) setting out a division of the family property among the members of the family, reserving nothing for himself. This is the family arrangement set up by the defendants.

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Their Lordships incline to the view that the term "will," as applied to this document, was a complete misnomer. It is manifest that it differed from a will in the crucial characteristic that it was intended to speak from the date at which it was written, and not from a future date, namely, the death of the writer. It was, in fact, and was intended to be viewed as, a record of a family arrangement then and there made and carried into effect partitioning the family estate among those interested. Indeed, in anticipation of this formal partitioning, the sons had been put into possession of their shares some two months previously. All this appears from the concluding passage of the document, which reads as follows: "All the three sons were put in separate possession of the estate in the beginning of the year 1303 Fasli" (September, 1895). "I have no other heir having a right besides those mentioned in this will. I have therefore executed this will in order that it may serve as evidence."

There is no doubt whatever as to the authenticity or date of this document. But the property was ancestral, and therefore Rao Balwant Singh, although head of the family, had no right to make a partition by will of that property among the various members of the family except with their consent. They had independent rights in it with which he could not interfere. The main question, therefore, is whether there is evidence sufficient to establish the consent of the plaintiffs Rao Karan Singh and Sheodan Singh to this family arrangement. If they accepted it, their acceptance would bind not only them but also their sons, who are the remaining plaintiffs, as they would be representing in the transaction their respective branches of the family.

Their Lordships are of opinion that the evidence of their

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acceptance of the partition is overwhelming. To appreciate it fully it will be necessary to examine in some detail the contents of the document itself and the acts of the parties consequent thereon.

[Their Lordships' judgment, after dealing at length with the terms of the document and the evidence above stated, continued.]

The claim of the plaintiffs in this action evidently arose from the suggestion of the pleaders whom they consulted after quarrels arose in the family, and was based on the fact that the document which evidences the partition is termed a will. It is obvious that such a partition could not have been made by Balwant Singh by will strictly so called. But, as has been already pointed out, the document is much more than a will (if indeed it is in any sense a will at all), for it describes and witnesses to a family arrangement contemporaneously made and acted on by all parties. Every one treated it as such at the time. The mutations of names shew this beyond controversy. There is nothing, therefore, in the fact that the document is called a will which invalidates the partition, which was undoubtedly made in fact, and which was acted on by all parties for ten years without any dispute or misunderstanding as to their respective rights under it.

Counsel for the plaintiff have endeavoured to support the contention that the partition was not intended to take effect in *præsenti* by reference to a provision to be found in this document. It reads as follows: "If I at any time come back from pilgrimages and find mismanagement or character of any one bad, then I shall have power to cancel this will, which shall be enforced from the date of its execution."

Their Lordships are of opinion that the highest effect that can be given to such words is that this evidences a contractual condition which the sons accepted in order to obtain the partition which gave them immediate possession of the property, and viewed thus, the contractual acceptance of a power of forfeiture in case of bad behaviour would not, in their Lordships' opinion, be sufficient to prevent the partition operating in *præsenti*. But the true interpretation of the provision is probably that it was merely put in as a threat in order to keep the sons in good behavior, and that it could not have been enforced specifically,

or even at all. It is certainly quite insufficient to outweigh the overwhelming evidence that this was a family arrangement accepted by all parties.

The above considerations relate only to the village property. In addition to this there were two buildings, one in Aligarh and the other at Sahaoli. The disposition in the document relating to these buildings is peculiar and did not in the opinion of the learned judge of first instance amount to an absolute disposition of them, and their Lordships are not prepared to differ from his views on this point.

There remains the movable property. As to this the family arrangement is absolutely silent. The plaintiffs are therefore entitled to their share of these movables as inherited property.

It will be seen, therefore, that their Lordships are of opinion that the judgment of the learned judge of first instance was right on all points. Both plaintiffs and defendants appealed from his decision to the High Court. That Court allowed the plaintiffs' appeal and dismissed that of the defendants. The defendants appealed from both of these decisions. In their Lordships' opinion the High Court ought to have dismissed both appeals. They will accordingly humbly advise His Majesty that the order of the High Court allowing the plaintiffs' appeal should be discharged with costs, and the decree of the Subordinate Judge restored, and that the order of the High Court dismissing the defendants' appeal should be affirmed. The plaintiffs must pay the costs of the defendants' appeal to His Majesty in Council, and the defendants must pay the costs of their unsuccessful appeal.

Solicitors for appellants : *Ranken Ford, Ford & Chester.*

Solicitors for respondents : *Barrow, Rogers & Nevill.*

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J. C.* JANKI PERSHAD SINGH DEFENDANT ;

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April 15, 16 ;
June 10.
—
DWARKA PERSHAD SINGH PLAINTIFF.

ON APPEAL FROM THE COURT OF THE JUDICIAL
COMMISSIONER OF OUDH.

Oudh Estates Act (I. of 1869, U. P.), ss. 3, 10, 22—Consent to Settlement before October 10, 1859—Patta and Kabuliyat signed later—Settlement in 1859 as Malguzar—Name entered in Lists I, and II. —Property subsequently purchased.

The holder before the Mutiny of an impartible taluq in Oudh having after the annexation petitioned for a settlement of his former property, the Chief Commissioner by a letter dated October 5, 1859, consented to half the taluq being settled with him. The patta and kabuliyat were not executed till October 13, 1859. The settlement was made with him as malguzar, and no sanad was issued. At the regular settlement in 1865-6 six further villages were settled with him. His name was entered in Lists I. and II. under s. 8 of Act I. of 1869 as a taluqdar whose estate ordinarily devolved on a single heir. Subsequently he purchased other villages, some of which had formed part of the original taluq :—

Held, that the villages settled in 1859 and in 1865-6 constituted a taluqdari estate within s. 3 of Act I. of 1869, the descent to which was regulated by s. 22 of that Act, but that the villages subsequently purchased were partible as property of the joint Hindu family.

CONSOLIDATED CROSS-APPEALS from a judgment and decree of the Judicial Commissioner (September 8, 1909) which varied a decree of the Subordinate Judge of Barabanki (September 15, 1908).

The plaintiff in the suit, Dwarka Pershad Singh, sued his elder brother Janki Pershad Singh and their mother for partition of certain villages enumerated in his plaint, claiming a third share as a member of a joint Hindu family governed by the Mitakshara law. The suit was contested by the defendant Janki Pershad Singh, who pleaded by his written statement that Rani Mau, comprising all the lands mentioned in the plaint, was a taluq subject to Act I. of 1869, and added "the property in suit is

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impartible; no partition can be made or ever has been made in this family in accordance with the custom." The first defendant died after the judgment appealed from and was represented by his infant son. The second defendant, the mother, was also dead, and no question remained as to her interest in the properties in suit.

The material facts were shortly as follows. In and previous to 1857 one Autar Singh was the owner in possession of the ancient taluq Rani Mau, then comprising twenty-one villages. He was eighth holder in regular descent, the taluq having increased from nine villages of which it consisted in 1700. On the re-occupation of the Province of Oudh after the Mutiny, all rights in the soil of Oudh (with certain exceptions) were confiscated by Lord Canning's Proclamation of March 15, 1858. The Government by a circular letter to the taluqdars dated June 23, 1858, invited them to present themselves in Lucknow and to tender their allegiance, assuring them that upon their doing so within the time limited their lives and property would be assured and the estate formerly possessed by them confirmed see Sykes' Compendium of Taluqdari Law, pp. 381, 382. Autar Singh failed to present himself within the time limited, and on August 7, 1858, eleven of his twenty-one villages, including five of the villages in suit, were settled by the Government with Raghubar and Nirmal Singh, and one village in suit was conferred on another person. As to the rest of the twenty-one villages, namely, nine villages, it appeared that certain collateral relatives of Autar Singh were allowed to engage for the revenue at the summary settlement in 1858. On July 22, 1859, Autar Singh appeared and in a petition, after explaining the reason for his delay in coming forward, he prayed that a settlement of his property might be made with him. After his claim had been considered the Chief Commissioner by a letter dated October 5, 1859, sanctioned the settlement with him of half the taluq, namely, nine villages. The Deputy Commissioner on October 13, 1859, ordered that a patta and kabuliyat in respect of the nine villages should be prepared for signature and that Autar Singh should be placed in possession. On that date accordingly a formal patta was executed in his favour by the settlement officers, and he executed a corresponding kabuliyat for

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all the nine villages collectively, and was placed in possession and signed a dakhil-nama. This settlement was made with him as malguzar. No formal sanad was issued to Autar Singh, but he was called on to make a declaration as to the law of descent applicable to his taluq, which he did on April 25, 1860, asking that it might "continue in his family entire and without partition according to custom."

Autar Singh's name was afterwards entered in the first list appended to Act I. of 1869 as taluqdar of the Rani Mau estate, and in the second list as a taluqdar "whose estate according to the custom of the family or before February 13, 1856, ordinarily devolved on a single heir." In the course of the regular settlement in 1865-6 the five villages above referred to as having formed part of the twenty-one villages comprised in the taluq, together with another village named Kamrauli, were settled with Autar Singh. In 1876 and afterwards he repurchased another village and certain sir lands which had belonged to the old taluq, and he further bought four more villages in suit, which had not formed part of it. Autar Singh died without issue in 1879 and was succeeded by his eldest nephew, who died in 1889 and was succeeded by his eldest son the defendant, whose name was entered in the register.

It will therefore be seen that the property in suit consisted of (1.) nine villages, part of the old taluq, conferred on Autar Singh in October, 1859; (2.) five villages, part of the old taluq, and the village of Kamrauli, settled at the regular settlement in 1865-6 (3.) property, part of the old taluq, subsequently purchased; (4.) property, not part of the old taluq, subsequently purchased.

On September 15, 1908, the Subordinate Judge delivered judgment. He held that the villages conferred in 1859 and the villages comprised in the regular settlement of 1865-6 constituted an estate within the meaning of Act I. of 1869, but that the lands subsequently purchased by Autar Singh were joint family property. By a mistake of fact he included in the latter class Kamrauli, which was settled in 1865-6. He accordingly made a decree in favour of the plaintiffs as to the lands purchased and Kamrauli, and dismissed the suit as to the rest of the property.

Cross-appeals were preferred to the Court of the Judicial Commissioner. That Court delivered judgment on September 8, 1909, dismissing the appeal of the defendants, and varying the decree in favour of the plaintiff by giving him a half instead of one-third of the lands purchased. This variation was in consequence of the death of the mother, the second defendant. On the question whether the lands in respect of which the plaintiff's suit had been dismissed did or did not form a taluqdari estate within Act I. of 1869 the learned Commissioners differed in the view they took. The first Additional Judicial Commissioner was of opinion that they did not. He considered that, whatever was the status conceded to Autar Singh before and after the summary settlement in 1859, the settlement then made was made with him as malguzar and not as taluqdar, and that consequently, having regard to the authorities, he was not within s. 3 of Act I. of 1869; and further that Autar Singh was not within that section because the summary settlement was, as he held, made on October 13, 1859, when the patta and kabuliyat were signed, and therefore not within the period referred to in the section. Consequently in his view there was no estate within Act I. of 1869, and the succession was not governed by s. 22 of that Act. On the question of custom, however, he found that the presumption under s. 10 arising from the entry of Autar Singh's name in Lists I. and II., coupled with direct evidence (which he described as meagre), was sufficient proof of a custom that the estate descended to a single heir, and that the defendants being in possession the plaintiff had failed to prove that he was the single heir. As to the purchased villages he held that the custom being proved only with the help of the presumption arising from s. 10 applied only to the estate as existing in 1869, and that there was no evidence upon which he could find that Autar Singh intended to incorporate the purchased villages with the impartible estate. The second Additional Judicial Commissioner agreed that it was not the intention of the Government in 1859 to deal with Autar Singh as a taluqdar, but he considered that by entering his name in Lists I. and II. under Act I. of 1869, s. 8, he was then treated as being a taluqdar, and that having regard to s. 10 he was to be treated as a person with whom a summary

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settlement had been made as taluqdar. Further in his opinion the summary settlement was effectively made before October 10, 1859, the signing of the patta and kabuliyat being merely formalities. He therefore considered that the villages settled in 1858 and in 1865-6 constituted an estate within Act I. of 1869. In all other respects he agreed with the conclusions of the first Judicial Commissioner. Both judgments treated Kamrauli as among the purchased villages, whereas it was in fact settled in 1865-6.

Both parties appealed.

Sir Erle Richards, K. C., and Kenworthy Brown, for the appellant (defendant.) The judgment appealed from was wrong in treating the villages purchased by Autar Singh after 1869 as partible. The family custom of impartibility was found by both Courts as applicable to the villages settled in 1859 and 1865-6, and that custom being established as to part of the family property, the onus is on those who seek to prove that it does not apply to particular property : *Thakur Ishri Singh v. Baldeo Singh* (1) *Jagrish Bahadur v. Sheo Partab Singh* (2) ; *Rajendra Bahadur Singh v. Rani Raghubans Kunwar*. (3) The custom of descent of the family property was not affected by the annexation of the province : *Nawab Ibrahim Ali Khan v. Nawab Muhammad Ahsan Ullah Khan*. (4) The purchased villages were merely accretions to the taluq and subject to the same custom of impartibility. This is more particularly so with regard to the villages which had before the Mutiny formed part of Autar Singh's taluq. The despatches cited in the schedule to Act I. of 1869 shew that it was the policy of the Government that estates in Oudh were to be impartible where possible, but that the Government would not force impartibility upon estates when contrary to the family custom. The intention and effect of that Act must therefore be taken to favour impartibility.

The village of Kamrauli, which was settled with Autar Singh in 1865-6, was included in the judgment among the purchased villages by an error of fact.

(1) (1884) 11 Ind. Ap. 135, at p. 148.

(2) (1901) 28 Ind. Ap. 100, at p. 110.

(3) (1908) 11 Oudh Cases, 256, at p. 260.

(4) (1912) L. R. 39 Ind. Ap. 85.

De Gruyther, K. C., and *Dube*, for the respondent (plaintiff). No part of the property in suit constituted a taluqdari estate within Act I. of 1869, since the conditions laid down in s. 3 were not satisfied. The summary settlement with Autar Singh was not made between April 1, 1858, and October 10, 1859, notwithstanding the consent of the Chief Commissioner on October 5, 1859. Autar Singh was not bound by the settlement until the execution of the patta and kabuliyat on October 13, 1859. Moreover to bring any person within the operation of the clause the settlement must be made with him as taluqdar: *Widow of Shunker Sahai v. Rajah Kashi Pershad*. (1) In both judgments it is found that the 1859 settlement was made with Autar Singh as malguzar. Sect. 10 does not apply unless the conditions laid down by s. 3 have been complied with. The settlements with Autar Singh constituted a new root of title and the Mitakshara rule applied to the descent of the taluq granted. The terms of the letter of October 10, 1859, set out in the schedule to Act I. of 1869, shew that the effect of the summary settlement was that a permanent title was "thereby acquired." That the intention of Act I. of 1869 was merely to carry out this principle appears from the Chief Commissioner's letter of January 28, 1859 (see Papers relating to Oudh, 1859), and the inclusion of the letter of October 10, 1859, in the schedule. See also Sykes' Compendium, pp. 51 to 57. The evidence as to family custom rested on three descents only and was not sufficient to establish the custom of impartibility; *Hyder Hossain v. Mahomed Hossain* (2); *Bhau Nanaji Utpat v. Sundrabai* (3); Mayne's Hindu Law, 7th ed., pp. 61 and 633. The judgment appealed from was right in holding that even if the family custom was proved it did not extend to the villages subsequently purchased. It was a question whether Autar Singh intended to incorporate these villages with the impartible estate: *Parbati Kumari Debi v. Jagadis Chunder Dhabal*. (4) There was no evidence of any such intention. No inference can be drawn from the descent of the villages to Autar

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(1) (1877) L. R. 4 Ind. Ap. 198, at p. 205.

(2) (1872) 14 Moo. Ind. Ap. 401, at p. 404.

(3) (1874) 11 Bomb. H. C. 249, at p. 269.

(4) (1902) L. R. 29 Ind. Ap. 82, at p. 98.

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Singh's nephew, as at Autar Singh's death the nephew was a sole surviving child.

Sir Erle Richards, K.C., (who was only called upon to reply as to the villages purchased after 1869). If the onus was on the defendants, which is denied, it should be held from the circumstances that Autar Singh intended that the villages purchased should form part of his impartible estate.

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The judgment of their Lordships was delivered by

MR. AMEER ALI. These are two consolidated appeals from a judgment and decree of the Court of the Judicial Commissioner of Oudh, dated September 8, 1909, and arise out of a suit brought by the plaintiff Dwarka Pershad in the Court of the Subordinate Judge of Barabanki, for partition of certain properties known as taluqa Rani Mau, in which he claimed a share as a member of a joint Hindu family governed by the Mitakshara law.

The two defendants to this action were the plaintiff's elder brother Janki Pershad and their mother Marjad Kuar, and as the mother, under the Mitakshara law, is entitled on the partition of ancestral property to an equal share with the sons for her life, the plaintiff asked for a decree in respect of a third share in the entire property included in the list attached to the plaint. The defendant Janki Pershad alone contested the suit, the ground of his defence being that the taluqa sued for was, under the provisions of Act I. of 1869, as also by custom governing the family, an impartible estate descendible to a single heir, to which the ordinary rules of the Hindu law of inheritance did not apply. The parties thus went to trial on two distinct issues, namely, whether the properties in suit belonged to a joint Hindu family and were subject to the incidents ordinarily attached to such properties, or whether they formed in whole or in part, under Act I. of 1869 or by custom, an impartible estate.

A short history of the family will explain the reasons on which the Courts in India have proceeded in arriving at their conclusions. The nucleus of the taluqa in dispute is said to have been formed by one Sukh shah. He owned nine villages, but the number increased to sixteen in the hands of his son and successor, Sakat Singh, who lived about the close of the

eighteenth century. In 1856, when the British first occupied the kingdom of Oudh, the taluqa included twenty-one villages, and was held by Autar Singh, eighth in descent from Gulal Shah, the original ancestor of the parties and the grandfather Sukh Shah. On the outbreak of the Mutiny Autar is said to have disappeared. Nor did he make his appearance on Lord Canning's famous Proclamation issued in March, 1858. The British authorities accordingly proceeded to make a settlement of his confiscated villages with third parties. But some time in July, 1859, Autar appeared before the authorities, explained the reason of his non-appearance before, and applied for a settlement of his villages. They were apparently satisfied with his explanation, and on October 5, 1859, an order was passed on his application, sanctioning the summary settlement with him of the remaining nine villages which had not been finally settled with others. The kabuliyat, however, was not signed by him until the 13th of that month. In the course of the regular settlement which followed shortly after, Autar obtained decrees for possession of six more villages. He was thus in possession of some fifteen villages when Act I. of 1869 was passed into law. Later on he acquired by purchase several other properties.

Autar died in 1879 without issue and was succeeded in the possession of the properties by his nephew Jang Bahadoor, the eldest son of his brother Bisheshur. Jang Bahadoor died in 1889, leaving him surviving two sons, namely, the plaintiff and the defendant, Janki Pershad, the latter being the eldest. On Jang Bahadoor's death Janki Pershad came into the possession of the entire property.

The Subordinate Judge has held that the properties which were settled with Autar in 1859, together with those decreed to him in the course of the regular settlement, form an "estate" within the meaning of Act I. of 1869 and are descendible to a single heir and are consequently impartible. But as regards the several properties Autar Singh acquired by purchase subsequent to the regular settlement the trial judge was of opinion that in the absence of evidence establishing an intention on his part to incorporate the subsequent acquisitions with the "estate" they must be held to be governed by the ordinary Hindu law of

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inheritance. He accordingly decreed the plaintiff's claim in respect of a one-third share in what he calls the "acquired" properties and dismissed the suit as regards the rest.

Both parties appealed to the Court of the Judicial Commissioner of Oudh, which affirmed the decree of the Subordinate Judge with a modification in respect of the parties' shares necessitated by the death of their mother Marjad Kuar, which became one-half each instead of one-third.

The plaintiff and the defendant have both appealed to His Majesty in Council against the judgment and decree of the Appellate Court. The plaintiff contends that the lower Courts were wrong in holding that the properties in respect of which his suit has been dismissed form an "estate" within the meaning of the Act and are, consequently, impartible; whilst the defendant urges that the properties, a half share of which has been decreed to the plaintiff, being accretions to the "estate" or taluqa, are equally impartible.

As regards the contention of the plaintiff, the first point to determine is the meaning which the Legislature has attached to the word "estate" with reference to properties coming within the purview of Act I. of 1869, and that meaning must be gathered so far as possible from the enactment itself. The term "estate" is defined in s. 2 to mean "the taluqa or immoveable property acquired or held by a taluqdar or grantee in the manner mentioned in section 3, section 4, or section 5, or the immoveable property conferred by a special grant of the British Government upon a grantee." And "taluqdar" is declared to mean a person whose name is entered in the first of the lists mentioned in s. 8.

Sect. 3 declares that: "Every taluqdar with whom a summary settlement of the Government revenue was made between the first day of April, 1858, and the tenth day of October, 1859, or to whom, before the passing of this Act and subsequently to the first day of April, 1858, a taluqdari sanad has been granted, shall be deemed to have thereby acquired a permanent heritable and transferable right in the estate comprising the villages and lands named in the list attached to the agreement or kabuliyat executed by such taluqdar when such settlement was made, or which may have been or may be decreed

to him by the Court of an officer engaged in making the first regular settlement of the province of Oudh, such decree not having been appealed from within the time limited for appealing against it, or, if appealed from, having been affirmed."

Sect. 8 provides that: "Within six months after the passing of this Act, the Chief Commissioner of Oudh . . . shall cause to be prepared six lists, namely:—

"First.—A list of all persons who are to be considered taluqdars within the meaning of this Act.

"Second.—A list of the taluqdars whose estates, according to the custom of the family on and before the thirteenth day of February, 1856, ordinarily devolved upon a single heir."

The rest of the section is immaterial for the purposes of this case. Sect. 22 lays down the rules relating to intestate succession to the estates of taluqdars whose names have been entered in the second, third, or fifth of the lists mentioned in s. 8. In the first instance it declares that if any taluqdar whose name is so entered were to die intestate as to his estate, such estate shall descend "to the eldest son of such taluqdar or grantee, heir or legatee, and his male lineal descendants, subject to the same conditions and in the same manner as the estate was held by the deceased."

It is common ground that "a summary settlement of the Government revenue" was made with Autar Singh in respect of nine villages "between the 1st day of April, 1858, and the 10th day of October 1859." Their Lordships are not omitting from consideration the fact that the kabuliyat was not executed until October 13. To this they will advert later. It is also admitted that he obtained decrees in respect of six other villages in the first regular settlement of the province, and that his name was entered in the lists prepared under the statutory provisions of s. 8. It is clear, therefore, that Autar was not only a taluqdar, but that his taluqa acquired by virtue of the above recited proceedings was an "estate" within the meaning of the Act.

One of the learned judges in the Court below has considered that the execution of the kabuliyat after the time-limit mentioned in s. 3 deprived Autar Singh's taluqa of the character of an estate defined in the statute, although in his conclusion he agreed with the Subordinate Judge in holding that it was impartible

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property. His view may shortly be summarized as follows: as the principal villages included in the taluqa were not acquired either under a grant or a summary settlement made between the two dates mentioned in s. 3, the property did not constitute an "estate" defined in s. 2; but as it appeared in the evidence that the taluqa had ordinarily devolved upon a single heir on and before February 13, 1856, it must be treated as an impartible estate descendible under the rules of devolution provided in s. 22. The other learned judge held in substance that under the circumstances of the case it may fairly be assumed that the summary settlement with Autar was made before October 10, 1859.

In their Lordships' judgment the less technical construction seems more in accord with the true intent of the enactment. It is easily conceivable that a settlement might be made within the time-limit, and yet the formal documents connected therewith might not, owing to causes beyond the control of the person with whom the settlement is made, be executed until later. The law must be absolutely explicit that non-execution within the time is fatal to the right which it expressly gives before it can be so construed. Clause 3, which declares the right a taluqdar acquires in villages and lands settled with him, states that "he shall be deemed to have acquired thereby" (that is by the summary settlement) "a permanent heritable and transferable right in the estate comprising the villages and lands named in the list attached to the agreement or kabuliyat executed by such taluqdar when such settlement was made." The right the taluqdar is declared to have acquired comes into existence with the settlement, the rest of the clause merely describes the properties with respect to which it takes effect. If the settlement was directed, on October 5, to be made with Autar Singh, the delay in the signing of the formal documents would not affect the right he acquired thereby, as the execution of the agreement would relate back to the time when the settlement was in fact made. The authorities charged with the execution of the duties imposed by s. 8 of the Act do not appear to have considered that the delay which had occurred in the signing of the kabuliyat affected Autar Singh's rights in the properties settled with him in 1859, or differentiated

him from the other taluqdars; and although the settlement had been made with him as malguzar, he was, in fact, included as a taluqdar in the general lists prepared under the section, and the property of Rani Mau was entered against his name as the estate in his possession. Sect. 10 of the Act provides that "the Courts shall take judicial notice of the said lists and shall regard them as conclusive evidence that the persons named therein are such taluqdars or grantees."

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Their Lordships have no hesitation in holding that the properties settled with Autar Singh in 1859, together with those of which he obtained possession under decrees passed in his favour in the course of the regular settlement, constitute an "estate" within the meaning of the Act, and are consequently impartible.

The defendant's appeal relates to that portion of the lower Court's decree which, affirming the order of the Subordinate Judge, awarded to the plaintiff a half share in the properties subsequently acquired by Autar Singh. Janki Pershad has died since the institution of this appeal, and he is now represented by his minor son Dharaband Singh. It is contended on his behalf that by the custom of the family these acquisitions became part of the original estate and are, therefore, not subject to the ordinary rules of inheritance.

Both the Courts in India have come to the conclusion that the evidence is insufficient to establish the alleged custom, and no adequate reason has been shewn to induce their Lordships to take a different view. The only other point that remains to be considered is whether the lands subsequently acquired were as a matter of fact incorporated with the taluqa. As has been pointed out by this Board in the case of *Parbati Kumari Debi v. Jagadis Chunder Dhabal* (1), the question whether properties acquired by an owner become part of "the ancestral estate for the purpose of his succession" depends on his intention to incorporate the acquisitions with the original estate.

The Courts in India have concurrently found against the defendant on this point, and their Lordships see no reason to differ from their conclusion. Both Courts appear, however, to

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have fallen into an error in respect of one property, Kamrauli, for a half share of which they have made a decree in favour of the plaintiff. It is admitted on his behalf that Kamrauli is one of the villages for which Autar Singh obtained a decree in the regular settlement proceedings. The decree of the lower Court must, therefore, be varied by the elimination of Kamrauli.

Subject to this variation both appeals will be dismissed, each party bearing his own costs.

And their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellant (defendant): *The Solicitor, India Office.*

Solicitors for respondent (plaintiff): *Barrow, Rogers & Nevill.*

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PARTAB SINGH AND ANOTHER PLAINTIFFS;
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ON APPEAL FROM THE COURT OF THE JUDICIAL
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Minor—Compromise of Proceedings—Absence of Consent—Decrees made without Knowledge of Facts—Setting aside Dismissal of Suit—Limitation Act (XV. of 1877) s. 7 and Sched. II., art. 10—Specific Relief Act (I. of 1877), s. 42—Code of Civil Procedure (XIV. of 1882), ss. 443, 462.

The appellants when minors had been defendants in a pre-emption suit in which the respondent (their guardian de facto) was plaintiff, and a second pre-emption suit as to the same property had been instituted in their names by the respondent, he and others being defendants. No guardian ad litem was appointed. Under a compromise agreement, to which the sanction of the Court had not been obtained, a decree was made in the first suit in favour of the respondent and the appellants' suit was dismissed. The appellants brought the present suit for a declaration that the compromise and decrees were not binding upon them. When the suit was commenced the time had elapsed within

* *Present*: LORD ATKINSON, LORD PARKER OF WADDINGTON, SIR SAMUEL GRIFFITH, SIR JOHN EDGE, and MR. AMEER ALI.

which they could, under the Limitation Act, 1877, s. 7 and Sched. II., art. 10, have commenced pre-emption proceedings :—

Held, that a declaration as prayed should be made.

Held, also, that the suit was not one brought under the Specific Relief Act, 1877, s. 42, under which the passing of a decree is discretionary.

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APPEAL from a judgment and decree of the Court the Judicial Commissioner (March 14, 1910) reversing a judgment and decree of the Subordinate Judge of Sitapur (July 29, 1908).

The appellants on February 27, 1908, commenced the present suit against the respondent, praying by their plaint for a declaration that the compromise deed and the decree dated December 15, 1899, passed in two pre-emption suits to which they had been parties, as minors, were not binding upon them, and that they were entitled to be restored to the position they occupied prior thereto.

In the first of the two suits referred to the respondent had been plaintiff and the appellants and others had been defendants; in the second the appellants had been plaintiffs and the respondent and others had been defendants. The suits were both in relation to the same property.

The respondent, who upon the death of the appellants' father assumed to act as their guardian and manager of their property had caused the second suit to be brought in their names, apparently in order to prevent persons having an inferior right of pre-emption to the appellants but one superior to his own from claiming to pre-empt. No guardian ad litem had been appointed to the appellants in either suit, but one Hari Pershad purported to be acting in that capacity and his name appeared as guardian in the title of the suits. The parties to the pre-emption suit in which the respondent was plaintiff entered into a compromise whereby the respondent alone was to have a decree for possession of the property on payment of Rs. 15,000. This compromise was signed by Hari Chand, purporting to act as guardian of the appellants. The sanction of the Court to the compromise was not obtained as provided by the Code of Civil Procedure, s. 462. On December 15, 1899, the Court decreed the respondent's suit in accordance with this compromise, and upon the same day, on the application of Hari Pershad for leave to withdraw the appellants'

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suit, made an order dismissing it. At the time this order was made the attention of the Subordinate Judge was drawn to the facts that minors were parties to the suits, but not to the facts that no guardian ad litem had been appointed nor that the compromise had not been sanctioned by the Court.

In the present suit the appellants, as plaintiffs, joined as defendants the respondent, Hari Pershad, such of the other parties to the pre-emption suits as were alive, and the representatives of those who were dead. With the exception of the respondent none of the defendants appeared or took any part in the proceedings. The Subordinate Judge delivered judgment on July 29, 1908, in favour of the plaintiffs and made a decree as prayed. The respondent appealed to the Court of the Judicial Commissioner and the appeal was heard before the Judicial Commissioner and the First Additional Judicial Commissioner. The Judicial Commissioner held that the appellants were not bound by the proceedings in 1899 as they were not effectively represented in that litigation. He doubted whether the suit was brought within the Specific Relief Act, 1877, s. 42, but in any event, if the Court had any discretion in the matter of giving relief, he considered it ought to exercise it in the plaintiffs' (appellants') favour. The First Additional Judicial Commissioner agreed in substance with the findings of the Subordinate Judge and the Judicial Commissioner that the appellants had not been effectively represented in the litigation and that the compromise had been improperly made on their behalf. He was, however, of opinion that, having regard to the consideration that the appellants in 1899 had no funds where with to take advantage of a decree for pre-emption in their favour, it was pre-eminently a case in which the Court should not exercise the discretion which he considered was vested in it by the Specific Relief Act, 1887, s. 42. The learned Commissioners further held that the point upon which they differed was a point of law within the meaning of s. 98 of the Code of Civil Procedure, 1908, and they accordingly directed that the appeal should be laid before the Second Additional Judicial Commissioner under that section. The appeal was re-argued before the Second Additional Judicial Commissioner, who by his judgment held that the compromise

of December 15, 1899, had been accepted by the Court trying the case, that the facts found to have been concealed from the Court by the respondent were not material points, and that their concealment by the respondent, if it was fraudulent at all, was not a fraud on the present appellants but on certain other possible pre-emptors. He was of opinion that the appellants' proper course would have been to bring a suit against the respondent alone for specific relief by means of a conveyance to them of the property subject to their paying to the respondent the price paid by him under the pre-emption decree. Without referring in terms to the Specific Relief Act, 1877, s. 42, he stated that he concurred in the opinion of the learned First Additional Judicial Commissioner that the appeal should be allowed and the suit dismissed.

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Arthur Grey and *R. Jacob*, for the appellants. The appellants were not effectively represented in the suits, and the compromise in pursuance of which the decrees were made was never sanctioned by the Court. The facts were not brought to the attention of the judge and it should be declared that the decrees are not binding upon the appellants: *Manohar Lal v. Jadu Nath Singh*. (1) The form of the suit, which was commented on in the judgments appealed from, is that stated to be the right one by Lord Macnaghten in the above cited case. The Specific Relief Act, 1877, s. 42, under which the Additional Judicial Commissioners thought the Court had a discretion entitling it to refuse to make a declaration, has no application to the suit. The Judicial Commissioner and the First Additional Judicial Commissioner agreed in finding the facts which in law entitled the appellants to relief; they differed only as to whether upon those facts the appellants should be given a decree. There was no point of law upon which they differed, and the appeal should have been dismissed under the Code of Civil Procedure, 1908, s. 98. If there was a point of law upon which they differed, the learned Commissioners should have stated it and referred it in terms to the Second Additional Commissioner. Having delivered their judgments they had no power to refer; *Lal Singh v. Ghansham*

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Singh. (1) If the granting or refusing the declaration was a matter of discretion, the discretion should not have been exercised against the appellants unless a strong case of inexpediency was shewn : *Isri Dut Koer v. Mussumat Hansbutti Koerain.* (2)

De Gruyther, K.C., and *Lowndes*, for the respondent. The appellants had no funds as minors with which they could have exercised a right of pre-emption if a decree had been made in their favour, and there was no obligation upon the respondent to raise funds on their behalf for that purpose. The time within which, under the Limitation Act, 1877, s. 7, the appellants could bring a pre-emption suit expired before the present suit was commenced. The declaration prayed for would therefore place them in a more favourable position with regard to pre-emption of the property than they could have been in, either if these suits for pre-emption had not been brought, or if they had resulted in a decree in their favour. There was not any fraud by the respondent upon the appellants whatever his motives may have been in instituting the suit. Under the circumstances the particular relief prayed was properly refused. [Oudh Law Act (XVIII. of 1876), ss. 6 and 9, as to rights of pre-emption, were referred to.]

Grey in reply.

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The judgment of their Lordships was delivered by

SIR JOHN EDGE. The suit in which this appeal from a decree of the Court of the Judicial Commissioner of Oudh has arisen was brought by Kunwar Partab Singh and Kunwar Ahbaran Singh in the Court of the Subordinate Judge of Sitapur against Bhabuti Singh and others on February 22, 1908. The plaintiffs, who are the appellants here, sought by their suit to have it declared that a decree which was made on December 15, 1899, in a suit for pre-emption which had been brought by Bhabuti Singh, who is respondent here, on June 26, 1899, against certain vendees and others, and in which the appellants, who were then minors, had been added as defendants, was not binding as against them. The plaintiffs-appellants also sought in this suit to have a decree set aside which had been made on December 15, 1899, in a suit

(1) (1887) I. L. R. 9 Allah. 625, at p. 642.

(2) (1883) L. R. 10 Ind. Ap. 150, at p. 156.

for pre-emption which had been brought on July 27, 1899, by them under the guardianship of one Hari Pershad against vendees and others and in which Bhabuti Singh had been added as a defendant, and they claimed to be restored to the position which they had held prior to December 15, 1899, and such other relief as they were entitled to.

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The material facts which their Lordships find are briefly as follows. The plaintiffs were the sons of Raja Balbhaddar Singh, who died on December 27, 1897. The property of the joint family included shares in Mahal Ismailganj and Mahal Khushalpur, in respect of which Raja Balbhaddar Singh was at his death recorded in the Revenue papers as the proprietor. After the death of Raja Balbhaddar Singh the defendant-respondent, Bhabuti Singh, assuming to act as the guardian of the plaintiffs and as the manager of their property, obtained in April, 1898, mutation of names in the Revenue papers in their favour. Syed Mohammad Ismail, Syed Idur Hasan, and Syed Mohammad Sadig on August 3, 1898, sold certain shares in Mahal Ismailganj and Mahal Khushalpur to Munshi Niaz Ahmad, Babu Ram, and Bhagwan Das. It was in respect of that sale that the suits for pre-emption of June 26, 1899, and July 27, 1899, were brought. The vendors and the vendees were original defendants to these suits. Bhabuti Singh had a right of pre-emption equal but not superior to the right of pre-emption of Partab Singh and Ahbaran Singh in respect of the shares which were sold in Mahal Khushalpur, and he had a right of pre-emption inferior to theirs in respect of the shares which were sold in Mahal Ismailganj. It is obvious that the interests of the minors Partab Singh and Ahbaran conflicted with the interests of Bhabuti Singh. On June 26, 1899, Bhabuti Singh on his own behalf brought a suit to pre-empt the shares which had been sold in the two mahals, and made the vendors and vendees defendants to the suit. On August 5, 1899, Bhabuti Singh caused Partab Singh and Ahbaran Singh, who were then minors, to be added as defendants to that suit. According to the amended plaint, Partab Singh and Ahbaran Singh, minors under the guardianship of Hari Pershad, were added as defendants under an order dated August 5, 1899. The Court appears to have

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made an order on August 5, 1899, that Partab Singh and Ahbaran Singh should be added as defendants, but it does not appear that the Court had ordered that they should be added as defendants under the guardianship of Hari Pershad. The amendment of the plaint adding Partab Singh and Ahbaran as defendants was not attested by the signature of the judge. No order appointing Hari Pershad as a guardian for the suit for Partab Singh or Ahbaran Singh was applied for or was made. By s. 443 of the Code of Civil Procedure, 1882, it was enacted that : " Where the defendant to a suit is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor, to put in the defence for such minor, and generally to act on his behalf in the conduct of the suit." By s. 441 of the same Code it was enacted that : " Every application to the Court on behalf of a minor (other than an application under section 449) shall be made by his next friend, or by his guardian for the suit." The result is that the minors, Partab Singh and Ahbaran Singh, were not in law represented in the suit which was brought by Bhabuti Singh.

On July 27, 1899, Bhabuti Singh, who was then the de facto guardian of the minors Partab Singh and Ahbaran Singh, and the manager of their property, caused a suit for pre-emption in respect of the sale of August 3, 1898, to be brought by Partab Singh and Ahbaran Singh under the guardianship of Hari Pershad against the same vendors and vendees who were defendants to the suit of June 26, 1899. The shares which it was sought to pre-empt by the suit of July 27, 1899, were the same shares which it had been sought to pre-empt by the suit of June 26, 1899. On August 7, 1899, Bhabuti Singh was added as a defendant to the suit of July 27, 1899. On July 27, 1899, Hari Pershad had in the suit in which Partab Singh and Ahbaran Singh were the plaintiffs filed an application to be appointed their guardian ad litem. The application purported to be made under s. 456 of the Code of Civil Procedure, 1882. The Subordinate Judge to whom the application was made by his order of July 27, 1899 held that the application was unnecessary, and directed that the costs should be borne by the plaintiffs in that suit in any event.

Bhabuti Singh, the vendors, the vendees, and Hari Pershad,

professing to act on behalf of Partab Singh and Ahbaran Singh, entered into an agreement of compromise, and on December 15, 1899, filed in the suit in which Bhabuti Singh was the plaintiff a petition in which it was stated that it was agreed that Bhabuti Singh should pay Rs. 15,000 without costs to the vendees, and that a decree for possession of the property sold should be passed in favour of Bhabuti Singh by right of pre-emption. On that petition the then Subordinate Judge passed a decree in that suit in favour of Bhabuti Singh. As Hari Pershad had not been appointed guardian for the suit for the minors Partab Singh and Ahbaran Singh, they were in law unrepresented, and the decree did not bind them. Further, Hari Pershad had not obtained the leave of the Court to enter into that agreement of compromise on behalf of the minors Partab Singh and Ahbaran Singh.

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In pursuance of the agreement of compromise to which their Lordships have referred, Hari Pershad, professing to act as guardian of the minors Partab Singh and Ahbaran Singh, on December 15, 1899, presented to the Court a petition in the suit in which Partab Singh and Ahbaran Singh were the plaintiffs, in which it was stated that it had been settled between the parties that a decree should be passed in favour of Bhabuti Singh in his suit, that the compromise had been filed in Court, and that Partab Singh and Ahbaran Singh were willing to withdraw their claim; and it was prayed that the withdrawal of their claim should be sanctioned, and that their suit should be dismissed. That petition was signed by Hari Pershad, Bhabuti Singh, the vendors, and the vendees. Hari Pershad appeared in Court in support of that petition, and stated that: "Since Bhabuti Singh has acquired this hakkiat on the basis of pre-emption, therefore the minors have now no objection, and they do not advance a claim to the said hakkiat as against Bhabuti Singh." On that petition the then Subordinate Judge dismissed the suit of Partab Singh and Ahbaran Singh. It does not appear that the Subordinate Judge was informed that the minors Partab Singh and Ahbaran Singh were in law unrepresented in the suit of June 26, 1899, in which Babuti Singh had obtained a decree as against them and others for the pre-emption of the shares which Partab Singh and Ahbaran Singh were in their suit claiming to pre-empt;

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nor does it appear that the Subordinate Judge was informed that the petition for the dismissal of the suit of Partab Singh and Ahbaran Singh was made in pursuance of an agreement of compromise which Hari Pershad, acting as next friend of the minors Partab Singh and Ahbaran Singh, had entered into without the leave of the Court. This Board has held in *Manohar Lal v. Jadu Nath Singh and Others* (1) that in cases to which s. 462 of the Code of Civil Procedure, 1882, applies there ought to be evidence that the attention of the Court was directly called to the fact that a minor was a party to the compromise, and it ought to be shewn, by an order on petition, or in some way not open to doubt, that the leave of the Court was obtained, and that it is not sufficient proof that the exigencies of s. 462 were complied with to shew that the minor was described in the title of the suit as a minor, as in that case, suing "under the guardianship of his mother," and that the terms of the compromise were before the Court. The agreement of compromise in pursuance of which Hari Pershad obtained the dismissal of the suit of Partab Singh and Ahbaran Singh was void as against them, and on that ground, if there were no other, they are entitled to have the decree dismissing the suit of July 27, 1899, set aside.

Hari Pershad had been a karinda of Raja Balbhaddar Singh, and he acted in a subordinate capacity under Bhabuti Singh in the management of the property of Partab Singh and Ahbaran Singh after Bhabuti Singh assumed the guardianship of the minors. Their Lordships agree with the learned Judicial Commissioner that in the proceedings to which they have referred "Hari Pershad was a mere dummy, that there was no one to protect the interests of the plaintiffs (Partab Singh and Ahbaran Singh), and that in fact Bhabuti Singh took advantage of his position." Their Lordships find that Hari Pershad was introduced into the suits of 1899 by Bhabuti Singh as the guardian or next friend of the minors Partab Singh and Ahbaran Singh to advance the interests of Bhabuti Singh and to defeat the interests of Partab Singh and Ahbaran Singh, for whom previously and subsequently Bhabuti Singh was acting as guardian and as the manager of their property. Hari Pershad throughout acted

(1) L. R. 33 Ind. Ap. 128.

under the directions and on behalf of Bhabuti Singh and in his interests and contrary to the interests of Partab Singh and Ahbaran Singh, and to their detriment. Upon these findings of fact it follows as an obvious conclusion that the compromise and the proceedings which were taken in pursuance of it were not binding upon Partab Singh and Ahbaran Singh, and it is clear, apart from the other considerations which their Lordships have already discussed, that Partab Singh and Ahbaran Singh are also on these findings of fact entitled to relief.

The Subordinate Judge of Sitapur in this suit gave Partab Singh and Ahbaran Singh a decree on July 29, 1908. From that decree Bhabuti Singh appealed to the Court of the Judicial Commissioner of Oudh. The appeal was heard by a Bench consisting of the Judicial Commissioner and the First Additional Judicial Commissioner. The learned Judicial Commissioner, on the facts found by him, held that Partab Singh and Ahbaran Singh were entitled to the decree which they had obtained from the Subordinate Judge, and that the appeal should be dismissed with costs. The First Additional Judicial Commissioner agreed with the findings of the Judicial Commissioner on all the material facts. In his judgment the First Additional Judicial Commissioner stated : " I agree with my learned colleague in holding that it is satisfactorily established that the appellant [Bhabuti Singh] was de facto manager of the minors' property at that time [1899], and that Hari Pershad in withdrawing the minors' suit acted under his instructions. If the case had been fought out the minors [Partab Singh and Ahbaran Singh] would probably have obtained a decree for the larger portion of the property and lots might have been drawn with respect to a smaller portion thereof. In arranging for this compromise the appellant acted in his own interests, and the reason why he got a pre-emptive suit instituted on behalf of the minors was to protect himself in case other persons who had a better right of pre-emption than himself instituted suits claiming pre-emption of the property. After the period of limitation for such suits had expired he withdrew the minors' claim and obtained a decree in his own favour."

Notwithstanding that finding the First Additional Judicial Commissioner, for reasons which appear to their Lordships to be

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irrelevant, considered that exercising a discretion under s. 42 of the Specific Relief Act, 1877, he ought to refuse to grant the relief for which Partab Singh and Ahbaran had prayed, and held that the appeal should be allowed and the suit dismissed with costs. Sect. 42 of the Specific Relief Act, 1877, did not apply. The Judicial Commissioner and the First Additional Judicial Commissioner, having differed in opinion on the point of law as to whether s. 42 of the Specific Relief Act, 1877, applied to the case, directed that the appeal should be laid before the Second Additional Judicial Commissioner under s. 98 of the Code of Civil Procedure, 1908. The Second Additional Judicial Commissioner did not apparently confine himself to a consideration of the point of law with which alone he had under s. 98 of the Code of Civil Procedure, 1908, jurisdiction to deal; he apparently agreed with the opinion of the First Additional Judicial Commissioner that s. 42 of the Specific Relief Act, 1877, applied, and held that the appeal should be allowed and the suit should be dismissed with costs in both Courts. In accordance with the opinions of the First Additional Judicial Commissioner and the Second Additional Judicial Commissioner a decree was passed on March 14, 1910, by the Court of the Judicial Commissioner of Oudh allowing the appeal and dismissing the suit with costs. From that decree this appeal has been brought.

Their Lordships are of opinion that this appeal should be allowed and the decree of the Court of the Judicial Commissioner should be set aside, and that the appellants, Partab Singh and Ahbaran Singh, should have a decree setting aside the decree of December 15, 1899, in their suit, and declaring that the agreement of compromise and the decree of December 15, 1899, in the suit of Bhabuti Singh are not binding upon them or either of them, and that they are entitled to such rights as they had before their suit was dismissed on December 15, 1899. Their Lordships will advise His Majesty accordingly. Bhabuti Singh the respondent must pay the costs of this appeal and of his appeal to the Court of the Judicial Commissioner of Oudh.

Solicitors for appellants : *Ranken Ford, Ford & Chester.*

Solicitors for respondents : *T. L. Wilson & Co.*

VAITHINATHA PILLAI APPELLANT ; J. C.*
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 THE KING-EMPEROR , . RESPONDENT. *June 16, 17 ;*
18, 19 ;
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 ON APPEAL FROM THE HIGH COURT OF MADRAS.

Criminal Proceedings—Grounds for setting aside Conviction—Substantial and Grave Injustice—Misreception of Evidence—Absence of reliable Evidence.

Conviction of abetment of murder and sentence of death set aside on the ground that substantial and grave injustice had been done, mainly by the admission of evidence which was inadmissible, and from the fact that at the end of the hearing before the judge of first instance there did not exist any reliable evidence upon which a capital conviction could safely and justly be based.

In re Dillet (1887) 12 App. Cas. 459, applied.

APPEAL from two orders of the High Court (June 19 and August 5, 1912) affirming the conviction and sentence of the Court of the Additional Sessions Judge of Tanjore (April 1, 1912), whereby the appellant was found guilty of abetment of the murder of his daughter-in-law, Dhanam, and sentenced to death. The facts of the case and the nature of the evidence held to have been misreceived fully appear from the judgment of their Lordships. The following is a short statement of the circumstances and of the proceedings.

The murder took place on the night of October 22, 1911, in the house of the appellant, in which the murdered woman and her husband Aiyasami, the appellant's son, were temporarily resident ; death was due to a wound or wounds, of which the body bore thirteen, inflicted with a sharp instrument, apparently an aruval which was found near the body. On the following day an inquest was held at which, chiefly upon the evidence of Mutachi, the maternal grandmother of Aiyasami, the jury found that Aiyasami had committed the murder.

On October 27, 1911, Aiyasami made a statement before the magistrate under the Code of Criminal Procedure, 1882, s. 342,

* *Present* : LORD ATKINSON, LORD PARKER OF WADDINGTON, SIR SAMUEL GRIFFITH, SIR JOHN EDGE, and MR. AMEER ALI.

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charging the appellant with the murder in conjunction with other persons.

On November 7, 1911, he was brought before the Sub-divisional Magistrate of Mannagardi, who, on November 27, 1911, released him and ordered the arrest of the appellant and other persons residing in his house.

On December 27, 1911, the Sessions Judge at Tanjore ordered the release of these persons on the ground that there was no evidence against them, but, on the statement of the Public Prosecutor that a person suspected of being concerned had made a confession, suspended this order. The suspect in question was one Thiagan, who on December 2, 1911, had made a statement implicating the appellant, his son Kalyanam, his daughter Thanga Babu, his wife Kanthimathi, his servants Kathiresan and Avani, Thiagan himself, and Thiagan's brother Somu. Of these persons Kalyanam and Somu could not be found, but the other six were brought before the magistrate. Thiagan was offered and accepted a pardon and Kanthimathi was discharged, but the other four were committed for trial for murder and abetment of murder.

The trial before the Sessions Judge of Tanjore began on March 15, 1912. Thiagan gave evidence in which he at first denied the truth of the facts contained in his statement, alleging that they were made under police influence. On the following day, however, he recanted and said that that statement was true. Aiyasami, Mutachi, and a large number of other witnesses were examined. Aiyasami's evidence at the trial closely followed that of the approver, but it did not take that shape until after the arrest and confession of the latter. It differed in material details from the statement which he had made on October 27, 1911. This statement he now declared to be untrue. Evidence was admitted that on the day after the murder a messenger had informed a brother of the deceased that she had died of cholera, but there was no evidence to connect this message with the appellant. For the defence evidence was given to shew that Aiyasami was of defective mental condition.

On April 1, 1912, the Sessions Judge delivered his judgment. He stated that in his opinion it would be unsafe to accept any section of the approver's story without independent corroboration,

and that evidence of Aiyasami would not bear the test of examination. The Sessions Judge, however, stated that he had arrived at the following findings :—

“ I find accordingly that there is no satisfactory evidence to establish the details of the approver's story ; but I find that the murder must have been committed by some of the inmates in Vaithinatha Pillai's house that night, and that the cloths M.O.'s 3 and 4 afford conclusive proof that more than one man assisted in the murder. I find also that the specific account of the murder given by the first accused and by his mother-in-law is demonstrably inconsistent with facts, that his conduct after the murder indicates a guilty conscience, and that he was the only one of the inmates of his house who is proved to have had any motive to murder Dhanam. On these findings I convict the first accused Vaithinatha Pillai of abetment of murder punishable under s. 302 read with either s. 109 or s. 114 of the Indian Penal Code, since he said to be physically incapable of having inflicted the injuries with his own hand, and I sentence him to be hanged by the neck until he is dead. The sentence is subject to confirmation by the High Court. I do not think that there is sufficient evidence to establish beyond doubt how or where the murder was actually committed or that either Kathiresan or Avani or Thanga Babu assisted in it, though it is highly probable that the former were amongst the agents employed by the first accused. I therefore acquit them and discharge them.”

The appellant appealed to the High Court, and the judgment of the Sessions Judge also came before that Court on a reference under the Criminal Procedure Code. The appeal was argued on June 5, 1912, before Bakewell and Sadasiva Aiyar JJ., who on June 19, 1912, delivered separate judgments, the former learned judge being for dismissing the appeal and the latter for allowing it. Both learned judges, however, were of opinion that reliance could not be placed on the evidence of the approver or of Aiyasami. Owing to the difference of opinion the case was re-argued before Sankaran Nair J., who delivered judgment on August 8, 1912, against the appellant. With regard to the evidence of Thiagan he stated that it was not relied upon before him. He thought that Aiyasami's evidence should be received

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with the greatest caution, but upon a review of the whole case he considered that the latter's evidence that the appellant instigated and was present at the death of the deceased woman was fully corroborated. He concurred in the view that the conduct of the appellant after the murder was more consistent with his guilt than his innocence. The appeal was accordingly dismissed and the sentence of death confirmed.

On December 16, 1912, special leave to appeal was granted to the appellant.

This report does not record the arguments of counsel in so far as they dealt with the details of the evidence.

Sir R. Finlay, K. C., Arthur Grey, and S. Swaminathan, for the appellant. There was no reliable evidence upon which the appellant could properly be convicted. The Sessions Judge dismissed the case against the other accused persons because he did not think that the evidence justified him in convicting them. The grounds upon which the Sessions Judge and the majority in the High Court gave effect as against the appellant to evidence which was held insufficient as against the other accused were erroneous. So far as that course was based upon the opinion that the conduct of the appellant after the murder shewed a guilty conscience, it was founded upon a body of evidence which was inadmissible, there being no evidence whatever to connect the messages as to the cause of death with the appellant. The motive on the part of the appellant suggested by the Sessions Judge rested entirely upon supposition, but even if motive had been adequately proved its existence was not a valid ground for acting upon evidence which was held as against the other accused to be untrustworthy and not worthy of belief. The learned judges who formed the majority in the High Court also acted erroneously in proceeding upon the assumption that either Aiyasami or the appellant was guilty and that a finding in favour of the former involved the guilt of the latter. The appellant was prejudiced by the fact that no police witness was produced by whose cross-examination the defence could establish under what circumstances and inducements the approver's confession came to be made. Taking into consideration these various

circumstances, more especially the misreception of evidence which was treated as of vital importance, substantial and grave injustice was done. The case falls within the principles laid down by *In re Dillet* (1) and the appeal should be allowed.

Sir Erle Richards, K.C., Kenworthy Brown, and E. R. Osborne, for the Crown. It is admitted on behalf of the Crown that no reliance can be placed on the evidence of the approver Thiagan. Apart from that evidence, however, there was material upon which the Courts below could properly convict the appellant, and the Board will not consider how far those Courts were justified in giving weight to the evidence. The case against the appellant differed from that against the other accused, in that besides the evidence of the approver there was in his case the statement of Aiyasami that he saw the appellant strike the murdered woman. As against the other persons Aiyasami gave no evidence that would support a conviction for murder or abetment of murder. The case does not come within the principles laid down by the Board as to the circumstances in which an appeal in a criminal matter will be entertained: *Reg. v. Joykissen Mookerjee* (2); *Falkland Islands Co. v. Reg.* (3); *Attorney-General of New South Wales v. Bertrand* (4); *In re Dillet* (1); *Ex parte Macrae* (5); *Ex parte Carew* (6); *Tshingumuzi v. Attorney-General of Natal*. (7) A misreception of evidence is not of itself a ground for a reversal of a decision if there was sufficient evidence to justify the decision: Indian Evidence Act (I. of 1872), s. 167. [As to the costs of the Crown *Rex v. Johnston* (8) was referred to]

No reply was called for.

The judgment of their Lordships was delivered by

LORD ATKINSON. The appellant in this case was, by the Additional Sessions Judge of Tanjore, convicted on April 1, 1912, of the abetment of the murder of his daughter-in-law named Dhanam, wife of his son Aiyasami, and was sentenced to death. By two orders of the High Court of Judicature at Madras, dated respectively June 19 and August 5, 1912, the conviction and

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(1) 12 App. Cas. 459.

(2) (1862) 1 Moo. P. C. (N. S.) 272.

(3) (1863) Ibid. 299, at p. 312.

(4) (1887) L. R. 1 P. C. 520.

(5) (1893) L. R. 20 Ind. Ap. 90

(6) [1897] A. C. 719.

(7) [1908] A. C. 248.

(8) [1904] A. C. 317.

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sentence were confirmed. The two judges of the High Court before whom the conviction came for confirmation, namely, Bakewell and Sadasiva Aiyar JJ., differed in opinion. The case was then, under the 378th section of the Code of Criminal Procedure, referred to a third judge, Sankaran Nair J., and these orders are practically the orders of Bakewell J. and the last-named judge. This appeal has been taken from these latter orders. In the view which their Lordships take of the case it will be quite unnecessary to deal with many of the topics discussed at great length both in the Court of the Sessions Judge and the High Court. For instance, many witnesses were examined to prove that the appellant had some motive to procure the murder of his daughter-in-law which, however inadequate to tempt ordinary human beings to commit such a crime, was quite sufficient to tempt a person such as the appellant, with his views, opinions, and passions, to commit it. The motive suggested was in the main this, that the son was greatly under the influence of his wife, the stronger character of the two, and was by her instigated to insist on her husband's right to the partition of certain lands between the members of the family, on the ground that they were the property of a joint Hindu family, while the appellant insisted that he had himself acquired them.

A minor and subsidiary motive was also suggested, which consisted in this, that the father gave an asylum in his house to a daughter named Thanga Babu—a child widow as she was styled, that is, a girl who had married when she was only ten years old and lost her husband by death before they had ever lived together as man and wife. Unfortunately, this woman had lapsed, or was alleged to have lapsed, from virtue, and the deceased woman, considering apparently that the reputation of the family would be compromised by the presence of the erring one in her father's home, refused to live there unless the sinner was compelled to live. In order to satisfy these scruples the appellant had sent this woman away, but permitted her to return to him. It was proved that this action caused, as was but natural, feelings of hostility and ill-will to be entertained towards the deceased by Thanga Babu. Both the Sessions Judge and the judges of the

High Court appear to have thought that these facts might well have furnished the appellant with a motive not only strong enough to lead him to procure the murder of his daughter-in-law, but of such overmastering force as to embolden him to run the risk of killing her in the open reckless manner suggested in the case, in the presence, and with the aid, of four or five accessories, in whose power he would thus absolutely put himself. These learned judges, it was urged, are well acquainted with, and are the best judges of, the habits, opinions, and feelings of the race and class to which the appellant and his family belong, as well as of those in the midst of whom they lived. However this may be, their Lordships think it safer, on the whole, to accept, for the purposes of this appeal, the conclusion at which they have arrived on this point. If, however, motive impels so irresistibly persons such as these to the commission of serious crime, it is difficult to see why the enmity existing between Thanga Babu and the deceased, caused as it was, might not also have moved this insulted woman to procure, or aid in, the removal of her enemy by foul means. But however these things may be, and however strong and convincing the evidence of an adequate motive may be, that evidence can never counteract the harm done by the reception of inadmissible evidence, or the injustice its use may lead to, nor by itself supply the want of all reliable evidence, direct or circumstantial, of the commission of the crime with which an accused person may be charged.

Their Lordships desire to abstain, as far as possible, from expressing any opinion upon either the guilt or innocence of any of the persons who have been accused of aiding in this murder, or upon the credibility of any witness who was not a witness against the appellant. Their task is to determine whether in the prosecution of the appellant, to use the words of Lord Watson when delivering the judgment of this Board in *Dillet's case* (1), "by a disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done." If they come to the conclusion that injustice of that kind has been done, then whatever doubts they may have of the appellant's innocence

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(1) 12 App. Cas. 459, at p. 467.

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or whatever supicions they may entertain of his guilt, or how-
 ever great may be their reluctance to interfere with or overrule
 the decisions of the Indian Courts in criminal matters, they
 think they are bound humbly to advise His Majesty that the
 conviction should not be allowed to stand.

Their Lordships have come to the conclusion that injustice of
 the kind mentioned has in this case been done, mainly owing to
 this, that a vast body of wholly inadmissible evidence, hearsay
 and other, has been admitted ; that when admitted it has been
 used to the grave prejudice of the accused ; and that at the end
 of the hearing before the judge of first instance there did not
 exist any reliable evidence upon which a capital conviction could
 safely or justly be based. The fact that their Lordships found
 their judgment on these points relieves them from the necessity
 of examining in detail any portions of the voluminous evidence
 not directly bearing upon them.

The appellant is a wealthy and apparently respectable land-
 owner of good position, living at the village of Pondi, in the
 Tanjore district of Madras. Aiyasami is the son of his third
 wife. He was brought up by his paternal uncle, one Sami
 Thevan, a village munsif, and was at the time of the trial about
 twenty-five or twenty-six years of age. He is described by the
 Sessions Judge as dull and weak-minded, and an effort was made
 to shew that from his temperament and character, as well as from
 some past exhibitions of unprovoked and unreasoning violence,
 he was a man likely to have an attack of homicidal mania. His
 wife, the deceased woman, was also a member of a respectable
 family. She was apparently a resolute and clever woman,
 about twenty-two years of age, and had acquired considerable
 ascendancy over her husband. There were two children of the
 marriage, both alive, and aged respectively about four and one
 and a half years. For six or seven years previous to the
 year 1911 he and she had been living with her relatives in a
 village in the neighbourhood of Pondi. The father and the son
 were upon bad terms. At length, by the intervention of friends,
 a reconciliation was to some extent effected, and Aiyasami, his
 wife, and two children went on September 13, 1911, to reside in
 the appellant's house, to see, it was stated, whether they would

get on together ; one of the terms, however, insisted upon by them was that Thanga Babu should not be permitted to reside in her father's house. It is not disputed that Aiyasami and his wife retired together to rest on the night of October 22 in their father's house, and that she was, during the night and before dawn, murdered with the most brutal and savage ferocity. Thirteen wounds were found to have been inflicted upon her body, all upon the left side, some few slight, but most of them very severe, and many such as could only have been inflicted with some sharp instrument used with very great force. For instance, wound No. 2 was an incised wound an inch long, half an inch wide, and half an inch deep over the left temple. Another, No. 3, a quarter of an inch long, one-eighth inch wide, one-eighth deep just behind the left ear, the lobe of the ear being cut off. No. 4, a cut three inches long, half an inch wide, and half an inch deep on the upper part of the neck on the left side, dividing the local blood-vessels in its course. No. 6, a transverse cut three inches long and half an inch wide, extending down to the bone on the left side of the lower jaw, and five or six other wounds of almost equal severity. Such a wound as No. 4 would, according to the evidence of Colonel Hasell Wright, an army medical officer, examined as a witness, have probably rendered the woman unconscious and unable to talk or walk, as also probably would have wound No. 9. Wound No. 1 would, he thought, probably have stunned her if caused by the weapon called an aruval, or bill hook, then shewn to him, and the fact that the wounds were all transverse would point, in his opinion, to their having been inflicted by one man in the light, not by two men in the dark, while the absence of wounds on the hands of the deceased would indicate that the woman, was murdered in her sleep rather than while struggling to protect herself.

On October 23, 1911, the day after the murder, an inquest was held upon her body and a verdict returned by the jury that Aiyasami Pillai, her husband, had murdered her with a blood-stained aruval then produced to them. The weapon had been found in the place where the deceased woman had slept, had been taken possession of by the police, and was produced at the inquest. On November 22, 1911, Aiyasami Pillai was brought

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before the second class magistrate at Tiruturaipundi in the Tanjore district charged with the murder of his wife, with the view apparently of his being returned for trial for the crime. The depositions of several witnesses, including that of an old woman, Mutachi, his grandmother, then an inmate of the house, were taken. She deposed that during the night she heard a noise like a thud, got up, went to where Aiyasami was sleeping, found him sitting on a cot on the right side of the bed and cutting his wife with an aruval : that she said to him " Boy, what do you cut?" and cried out, " He has killed, he has killed" ; that the baby then sleeping in the cot woke up, and that there was blood but no wounds upon it. The magistrate, instead of returning the accused for trial, stated he disbelieved the evidence against him, admitted him to bail, and next day, the 28th, discharged him from custody. In delivering judgment he said : " The defence theory is not completely before me. It goes to shew that the deceased was obnoxious to the father of accused and to Thanga Babu, and she, Thanga Babu, decoyed her into the cattle shed, or back yard, and gave her into the hands of the accused's father and satellites, who brutally killed her, and laid her out in her bed and forcibly put a bloody cloth on the accused and accused him of murder." According to the defence the murder took place about midnight. The magistrate concluded by saying " All these circumstances point the suspicion against the accused's father, step-sister, step-brother Kalyanam, the servant Kathiresan, and others. This will be further investigated." Aiyasami was the only person who had been charged. There is no proof that the defence to which the magistrate refers as put forward on his behalf was not put forward at his instigation or with his concurrence. It differs in every particular from the account subsequently deposed to by him. This magistrate had no doubt jurisdiction to take the course he actually took, but the discharge is not an acquittal. Aiyasami might have been tried again ; he, to use the words of the Sessional Judge, " was not safe," at the time of the subsequent trial, and one of the results of his discharge under the circumstances was necessarily this, that he was subjected up to and during the trial to a tremendous temptation to endeavour to put the halter round his father's

neck in order to save his own. That circumstance can never be lost sight of in estimating the value to be attached to the evidence he subsequently gave.

On November 27, the day previous to the delivery of this pronouncement, this same magistrate had ordered the arrest of Thanga Babu, Kathiresan, the appellant's servant, and Kalyanam, his son. On December 2 the appellant's wife, Kanthimati Achi, and Avani Konan were also arrested. Ultimately every inmate of the appellant's house was arrested, with the consequence that their mouths were closed, since, though accused persons may make a statement, and the judge or magistrate may put questions to them, they cannot be examined as witnesses on their own behalf. On October 27, the second class magistrate of Tiruturaipundi took from Aiyasami a statement, not on oath, which was ultimately put in evidence by the prosecuting counsel at the trial in corroboration, it was said, of the former's evidence, although it is in many respects inconsistent with it. In it he states that he, his son (the baby), and his wife, the deceased, had gone to bed; that his wife lay with her head northwards, the child in the middle, and he on the eastern side; that Kanthimati Achi, the wife of the accused, Thanga Babu, his sister, and Kalyanam, his brother, were pressing down his wife; that his father, the appellant, cut her with one stroke; that he went near his father and said "Don't cut, leave off," and that the blood spurted on a red cloth he was wearing at the time, and stained it; that his father and brother Kalyanam said "You catch hold of that fellow, and keep him"; that thereupon the two servants Kathiresan and Avani, and one Somu, the son of an employee or agent of the appellant, caught hold of him and kept him; that ten or fifteen minutes after he was caught hold of and thus kept, they all came out to where he was; that while he was kept under restraint the noise continued to be heard, and that at dawn he went and saw that other cuts had been inflicted on his wife. This, having regard to what followed, is in many respects a most important statement. First, it was proved in the case and was admitted in argument before their Lordships that the statement that at the time his wife was murdered he was wearing this red loincloth was untrue. It was proved to be

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his cloth, but it was also proved that the cloth he wore the night his wife was murdered was a white cloth. Secondly, he does not state that a man, Thiagan, was present on the occasion of the murder or took any part in the proceedings. Thirdly, he made no suggestion that his wife was removed from the room where she lay before she was killed. On the contrary, the fair meaning of his words would rather appear to be that she was murdered where she lay. On December 6, 1911, this Thiagan was arrested, as appears from the report of the arrest which was an exhibit, by Detective Inspector D. S. Krishnasami Aiyar, and next day brought before the same magistrate. He was kept in custody, and on the 28th of that month the magistrate writes to his superior officer, I. T. Gillespie, to announce that Thiagan had made a full confession implicating the appellant and the other prisoners, corroborating the evidence given by Saminatha Pillai in the previous inquiry, and implicating the informant himself. On December 14 following a statement was taken from this man by V. S. Narayan Row, a second class magistrate, and he was subsequently, on March 18, 1912, examined as a witness at the trial. The story told in the confession is strange and revolting. He brings upon the scene his brother Somu as well as himself, all or almost all of the inmates of the appellant's household, and two unnamed strangers unknown to him. He represents that he himself, his brother Somu, Kathiresan and Avani, the two servants, by the orders of the appellant took away Aiyasami to a second compartment and tied him there, Avani being left in charge with directions, given by the appellant, to hack him if he talked; that Somu, Kathiresan, and himself then returned to where deceased was; that the appellant's wife Kanthemati pressed down the shoulders of the deceased; that Kalyanam, the son, closed her mouth; that by the appellant's directions Kalyanam and Kathiresan lifted the woman by the head side, he and Somu by the feet, and, conducted by the appellant, and followed, with a light, by Thanga Babu, carried her into the cowshed, and laid her down at the foot of an orange tree; that the two unknown men were standing there; that the appellant then said to these men "Do your business"; that thereupon one of them, coming to the right side, cut the deceased

between the ear and the right shoulder with an aruval; that the appellant then addressed these nameless men, saying, "You men despatch the business soon," and thereupon the men proceeded to hack the deceased to death; that subsequently the appellant said to him, "There is a dyed cloth; take it. Aiyasami is now wearing on his waist a white cloth; take it off and dress him with this dyed cloth," and that he, Thiagan, subsequently did so. This last statement, it will be observed, is in direct contradiction to the statement made by Aiyasami on October 27, already referred to, who, when asked to explain how bloodstains had got on the red dyed loincloth taken from him, replied that when his father (the appellant) cut the deceased with one stroke her blood spurted out upon it.

This man was on March 18 examined as a witness. He stated he did not see the appellant the night of the murder, that he did not go to his house that night, that Mutachi had told him Aiyasami had cut his wife, and that he did not see any one cutting her. He was thereupon, by the permission of the Court, cross-examined by the Public Prosecutor.

The cross-examination ran as follows :—

(By permission of Court, cross-examined by Public Prosecutor.)

" Q. Were you examined by the Nidamangalam sub-magistrate

" A. Yes.

" Q. Did he record what you said ?

" A. I deposed before him as I was tutored by the police.

" Q. Did you tell him that ?

" A. I was asked by the police not to say so.

" Q. Did you tell the magistrate the truth ?

" A. I told him what the police told me.

" Q. Was it the truth ?

" A. The only truth is what I have said Mutachi told.

" Q. Did you tell the sub-magistrate what Mutachi told you ?

" A. I did not, as I was asked by the police not to say so.

" Q. Everything that you told the sub-magistrate was false ?

" A. I told him what I was asked to say. I was asked to speak falsely and I spoke falsely."

These being his replies, his confession was read over and filed as evidence. Next day, on being brought into Court, still in

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custody, he volunteered that on the day before, when he saw the Court and people, he was afraid, and that he now wished to speak the truth. But he was never asked, either by the Court or by counsel on either side, to name the officer or officers of the police who asked him to give false evidence. The officer who arrested him was not produced, nor was any witness produced by whose cross-examination the defence would have had an opportunity of ascertaining at whose instance he was arrested, or how this confession came to be made, or what inducements, if any, were held out to him to make it. Everything connected with it was, as far as the appellant was concerned, done in the dark. Sir Robert Finlay, who opened this appeal, complained bitterly, and, in their Lordships' view, not without reason, of the great injustice done to the accused by the adoption of such a course of procedure. The Sessions Judge most naturally and rightly came to the conclusion that it would be unsafe to accept any portion of the approver's story without independent corroboration. Bakewell J. thought that no reliance could be placed upon it. And the third learned judge who heard the case said that the informer's evidence was not relied upon before him. Sir Erle Richards, quite rightly, in their Lordships' view, early in the argument, stated he did not intend to rely upon it. This evidence may therefore be taken as struck out of the record, but though struck out, it leaves its taint behind it, and reflects back upon the evidence of Aiyasami, the only other witness who gives direct testimony as to the commission of the crime by the appellant, for this, amongst other reasons, that on January 18, 1912, three weeks after the informer's confession had been taken, Aiyasami had himself made a deposition, evidently designed and intended to corroborate the informer's story. In it he brings upon the scene the informer, whom before that he had never mentioned as having been present. The statement that the informer had tied the red cloth round him after all was over conforms with the latter's story, though it is in conflict with his own previous account, and the further statement that he had been tied to a pillar, never made before, was obviously introduced for the same purpose. The stories told by both these men are thus designedly made to

harmonize and fit into each other. When one story is rejected as incredible the reliability of the other is necessarily affected. He (Aiyasami) was examined as a witness at the trial on March 21, 1912. He then stated that his statement given to the magistrate G. S. Vaithinatha Aiyar on October 27, 1911, was not true; that the Inspector Krishnasami Aiyar "troubled" him to make it, and that he saw this inspector in the gaol seven or eight times before he made it. In cross-examination he said that he told the magistrate he lay with his head to the north, because the sub-inspector told him to say so; that the sub-inspector said it would be a good thing for him to say that, but that he did not mention why, and that it was not true that he was lying on the east side of his wife. He further said it was false that his father cut his wife with one stroke, that the inspector told him to say so, that he told the sub-magistrate that he had omitted the name of the informer in his statement made on October 27, 1911, because the sub-inspector had asked him to do so, and that he had told the magistrate that the sub-inspector had told him to suppress Thiagan's name, but did not ask him to suppress Somu's name. He further stated that it was the sub-inspector who told him to say that he saw his father cut his wife, and also to say that the murder was on the cot in the room. He admitted that he had denied to the sub-magistrate the statement that the sub-inspector had told him to mention the name of the person who killed his wife, but that he did this at the dictation of the sub-inspector. Several charges of less importance were made by the witness against this sub-inspector and this sub-magistrate. These latter were examined as witnesses and denied them all. If true they shew that these officials or at least the sub-inspector induced the witness to forswear himself, and found in him a pliant instrument ready to give false evidence upon oath to secure the conviction of his own father, and, if false, they shew that the witness was ready to commit, and did commit, deliberate perjury whenever he was confronted with the inconsistencies in his former statements.

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There is no alternative. Forgetfulness is, their Lordships think, out of the question, and no confusion produced by the

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most skilful cross-examination can account for statements which must either be the witness's own inventions, or the inventions of others repeated by him with knowledge of their character. In either event their Lordships are clearly of opinion that this witness's evidence is wholly unreliable, and should be disregarded as completely as that of the informer. The learned Sessions Judge appears himself to have taken a similar view of this man's evidence, at least to a large extent. When referring to it he said : " But though I do not wish to apply a meticulous standard to his evidence, I do not think it will bear the test of examination." And so fully does he appear to have been convinced of this that he acquitted and ordered to be discharged three of the persons whom Aiyasami had expressly charged with being active aiders and abettors in the murder.

Sir Erle Richards urged upon their Lordships the danger of disturbing the verdicts of judges in criminal Courts in India, who, having seen and heard the witnesses, had believed them, and founded their decision upon their testimony. Their Lordships are fully alive to those considerations. But this is emphatically not a case of that character. It is precisely the reverse of that. Here the judge who heard and saw the witness did not think his evidence so reliable that he could act upon it alone. If he had thought it reliable he could not have ordered the discharge of the three prisoners implicated by it. His statement is very explicit : " I do not think that there is sufficient evidence to establish beyond doubt how or where the murder was actually committed, or that either Kathiresan or Avani or Thanga Babu assisted in it, though it is highly probable that the former were amongst the agents employed by the first accused. I therefore acquit them and discharge them."

The learned Sessions Judge based his conviction of the appellant on five specific findings, as he styles them. These are all stated by him in his judgment, and are as follows : 1. That the murder must have been committed by some of the inmates of the appellant's house that night. 2. That the clothes, i.e., the two loincloths which were spotted with blood, afforded conclusive proof that more than one man assisted in the murder. 3. That the accounts

given by the appellant and his mother-in-law (i.e., Mutachi) were demonstrably inconsistent with facts. 4. That the appellant's conduct after the murder indicated a guilty conscience. 5. That he was the only one of the inmates of the house who is proved to have had any motive to murder Dhanam.

Their Lordships do not think that this last conclusion necessarily follows from the evidence. As to the first, if the learned Sessions Judge had said that the murder must have been committed either by or with the connivance or assistance of some of the inmates of the appellant's house, their Lordships would be inclined to concur with him. The second finding is, they think, a non-sequitur. It assumes that the two cloths, both of which belonged to Aiyyasami, could not have been worn by him at two different stages in this outrage, and must at the time of the murder have been worn by two different men. But Aiyasami never said so; on the contrary he first stated he had worn the red one at the time of the murder, and that his wife's blood spurted on to it when his father cut her with one stroke. Then he swore that he wore the white cloth on that night, and that the red one was put on him by the approver by his father's directions. This theory is in direct variance with every one of Aiyasami's statements. If the cloth not worn at the time the murder was committed was in the compartment where the deceased and her husband slept it may well have got her blood upon it, much of which must have been shed. If he changed his clothes after the murder the second might well have got stained in this room. There is no evidence where the clothes not in use were kept. If in the room where the murder was committed they might well have been stained with spots of blood as they have been found to be, and, besides, spots of blood might have got on one of them from other sources. Moreover the proof, as is usual in such cases, only established that the blood was mammalian blood.

As to the third finding their Lordships would quite concur with the Sessions Judge if it is to be assumed that the story told by the informer and Aiyasami is true, but they fail to find anything in these accounts to shew they are demonstrably inconsistent with the facts on any other assumption. The fourth

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finding opens up a wide field. A large body of inadmissible evidence, hearsay and other, was admitted, some unimportant in bearing and effect, some very prejudicial to the accused. Statements made in the absence of all the accused, such as the conversation between Sami Thevan and Aiyasami, in which the latter was urged to say nothing about the murder and to compromise with his father, and statements made in the absence of some of the accused but in the presence of others were lumped together and used, in globo, apparently, against all. But this finding is based in the main upon a piece of evidence which was utterly inadmissible, and which, when admitted, was pressed home by the prosecution against the accused with great effect, and, as is evident from the judgments, wrought the greatest injustice. It is this: messengers were sent not by the accused, but by a friend, to announce the death of the deceased to some friends and acquaintances of the family in another village. These messengers told some persons to whom they spoke that the deceased woman had died of cholera. The rumour spread. The person who sent the messengers was sworn and examined. He denied that he had ever instructed them to make such a statement. Not a particle of evidence was adduced to shew that the appellant had himself instructed these messengers to make this statement, or directly or indirectly ever authorized any one to make it for him or on his behalf, or that he knew anything about it. Yet, without the foundation for admitting these statements ever having been laid, they were admitted in evidence, and, because the bodies of persons who die of cholera in India are almost immediately cremated to avoid the spread of infection, were relied upon by the prosecution, and accepted by some of the Judges who considered this case, as clear and convincing proofs of the appellant's consciousness of guilt, and of his desire (in one instance it is styled an attempt) to destroy the evidence of his crime.

It appears to their Lordships that a grave and substantial injustice was done to the appellant in admitting and thus using this piece of inadmissible evidence. The two other matters relied upon as proofs of the accused's guilty conscience are first a conversation about the cremation of the remains, the ordinary

way of disposing of the bodies of dead Hindus in India, which was perfectly innocent on its face, and may well have had reference to nothing more than the funeral which was to take place in due course. The rumour of the death by cholera was permitted to reflect back, however, on this simple incident, and in the eyes of the Sessions Judge gave to it a guilty complexion. In their Lordships' view this piece of evidence gives no support whatever to the fourth finding. The other incident relied upon to support the finding is this : Sami Thevan, the village munsif, who entertained no friendly feeling towards the appellant, was sent for before 6 o'clock in the morning. He arrived at the appellant's house about 6 A.M. He was shewn the body of the deceased, saw Aiyasami and took a statement from the appellant, and gave it to the police five or six days later, but the police were not communicated with for some hours, and did not arrive on the scene till about 11 o'clock. It was contended that the room in which the deceased slept had by that time been arranged, and the body of the deceased placed in a position it could not have occupied at the time of the murder. This may well be, but many people had access to the room as well as the appellant.

There is no evidence that he himself did or procured to be done to the body any of these things. The matter specially pressed against him is the tardiness of the communication with the police. Their Lordships think that in this case that is rather a negative circumstance. Whether the father himself committed the murder or the son committed it, eagerness to communicate with the police could not well be expected from him. The following passage from the judgment of the Sessions Judge deserves attention. It runs thus : " On these findings (the five preceding) I convict the first accused (i.e., the appellant), Vaithinatha Pillai, of abetment of murder punishable under s. 302 read with either s. 109 or s. 114 of the Indian Penal Code since he is said to be physically incapable of having inflicted the injuries with his own hand." Lieutenant-Colonel Wright had deposed that wound No. 4 would probably have rendered the woman unconscious, that it might have been inflicted with a weapon such as the aruval shewn to him, but that he had examined the appellant, that he had a badly united fracture of the bone of the right

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forearm, and that his hand was more or less deformed, and that considering the state of his right arm, he could not have inflicted this wound. What their Lordships presume the learned Sessions Judge meant by this paragraph is this, that the appellant did not himself inflict the blows, but of course, if the case against him has any truth in it, he was a principal.

The facts so found by the Sessions Judge furnish in his view the corroboration of the evidence of Aiyasami which rendered it, reliable as against his father, though unreliable against the other three persons accused. In their Lordships' view, the inferences which the Sessions Judge has drawn from the evidence and embodied in these findings cannot reasonably be drawn from it. They think that the evidence reasonably interpreted affords no corroboration at all of Aiyasami's story. The so-called circumstantial evidence in their opinion in no way strengthens the direct evidence, which, as already stated, cannot be relied upon, and, for these with the other reasons already mentioned, they think that the conviction of the accused should not be allowed to stand. Their Lordships have humbly advised His Majesty accordingly.

Solicitors for appellant : *T. L. Wilson & Co.*
Solicitor for respondent : *The Solicitor, India Office.*

RAMKISHORE KEDARNATH AND OTHERS . PLAINTIFFS ;
 AND
 JAINARAYAN RAMRACHHPAL AND OTHERS . DEFENDANTS.

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June 19, 20,

23 ;

July 11.

ON APPEAL FROM THE COURT OF THE JUDICIAL
 COMMISSIONER, CENTRAL PROVINCES.

*Hindu Joint Family—Partition by Father—Suit by Sons to recover Property
 —Form of Suit—Adoption—Limitation of Claim by Sons unborn at Date
 of Alienation—Limitation Act (XV. of 1877), s. 7 and Sched. II., art. 126.*

The appellants, four brothers and members of a Hindu joint family, in December, 1907, commenced a suit against the respondents, alleging that their father (who was joined as a defendant) had made an improper alienation of part of the joint family property to the first respondent by partition in 1898, and claimed as relief that the defendants might be ordered to deliver to them possession of whatever part of the property was in their possession. It was admitted by the appellants that the first respondent had been in joint possession of the property with their father since 1887 and in separate possession of the share allotted to him by their father since 1898. The eldest appellant was born in 1886 and attained his majority within three years of the commencement of the suit ; the three younger appellants were not born until after 1887, when the first respondent's joint possession of the property commenced. The suit had been tried upon the pleadings and admissions, and dismissed :—

Held, (1.) that the appellants were entitled to bring the suit in the form in which it was presented and without praying for a partition of the property ; (2.) that the suit be remanded for trial on the evidence with a declaration that it was competent for the Court at the trial to make the whole or part of the relief granted to the appellants conditional upon their assenting to a partition of their father's share so as to give effect to any right which the first respondent might be entitled to claim through him, but without expressing any opinion whether or not any such right existed in law or in fact ; (3.) that if the eldest appellant succeeded in the suit his younger brothers would be entitled to share in the relief granted.

APPEAL from a decree of the Court of the Judicial Commissioner, Central Provinces (July 26, 1909), confirming a decree of the District Judge of Wardha (September 1, 1908).

The suit out of which the appeal arose was instituted on December 20, 1907, by the present appellants, the four sons of

**Present* : LORD ATKINSON, LORD PARKER OF WADDINGTON, SIR SAMUEL GRIFFITH, SIR JOHN EDGE, and MR. AMEER ALI.

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one Kedarnath, in the Wardha Court, claiming possession of certain immovable and movable properties which had come to the share of the respondent Jainarayan (the principal defendant in the suit) upon a partition between him and the father of the appellants on October 24, 1898. The appellants' father Kedarnath was joined as a defendant and was the third respondent in the appeal. The second respondent had been made a defendant as an alienee of part of the estate. There had originally been other defendants alleged also to be alienees. Particulars of the property, which was of considerable value, were given in the plaint and in certain lists filed by the appellants.

The prayer of the plaint was "that each of the defendants be ordered to deliver to the plaintiffs the possession of whatever property he has with him out of that mentioned in the plaint, that the costs of the suit be awarded to the plaintiffs, and that any other relief deemed fit be also granted to them."

It appeared from the pleadings that the property in suit descended from one Harbhajan to his two sons Ramnath and Rambilas, who remained joint until the death of Rambilas in 1881. The appellants alleged that Ramnath died in 1883, having in January, 1877, adopted Kedarnath, the father of the appellants, and that after the death of Rambilas Ramnath gave his consent to the name of Jaidevi, the widow of Rambilas, being entered in the Government records in place of Rambilas. The principal questions of fact in dispute upon the pleadings were as to the validity of the adoption of the first respondent Jainarayan by Jaidevi, which was alleged in the first respondent's written statement to have taken place in 1885. The appellants did not admit the date of adoption, but by their plaint stated that Jaidevi from October, 1887, "began to declare him to be her son," and admitted that from March 1, 1889, the properties which had stood in Rambilas' name were transferred to the name of Jainarayan as Rambilas' adopted son.

The original validity of this adoption turned mainly upon the customs of the Dhusar tribe to which the parties belonged. There was also a dispute as to the authority of Jaidevi to make the adoption. Among other defences the respondents pleaded the Limitation Act, 1877. Upon this question the dates of

birth of the appellants were material. From these dates, as alleged in the plaints, it appeared (1.) that the suit was filed just within the expiration of three years after the first appellant attained his majority; (2.) that only the first appellant was in existence in 1887, when the first respondent (Jainarayan) was, as admitted by the appellants, accepted as a member of the joint family; and (3.) that all the appellants were minors at the date of the partition in 1898.

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In addition to the facts admitted on the pleadings, the plaintiffs' pleader in his oral statement before the Court on April 4, 1908, made the following admission: "The plaintiffs' father has actually given possession of the properties in suit to the defendant No. 1 to enjoy it exclusively by himself in 1898. Previously he was living as a joint member and jointly enjoying the property by reason of the plaintiffs' father's inaction and acquiescence in this mode of enjoyment."

On July 18, 1908, issues were settled by the District Judge and certain of them were set down for trial without evidence as preliminary issues of law arising on the pleadings and admissions of the parties. Of these the first three were material to the present appeal and were as follows: (1.) Whether the plaintiffs can maintain this suit in the present form without suing for partition; (2.) Are plaintiffs bound by the acquiescence of their father in admitting the defendant No. 1 in the family and allowing him a share in the property? (3.) Since defendant No. 1 has been in joint possession of the property with Kedarnath since 1887 and in separate possession of his share since 1898, has he acquired an absolute title to the property in dispute? If plaintiffs' father's claim is time-barred, has their claim become time-barred also?

The District Judge delivered his judgment on September 1, 1908. On the first issue he held in effect that the suit was maintainable in the form presented in the plaint, though from his finding on a later issue it appeared that he thought that the appellants would in any event only be entitled to recover four-fifths of the property in dispute. On the second issue he held that the appellants were bound by their father's conduct in admitting the first respondent as a joint owner in the family properties and

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by the partition effected between them; and he was also of opinion that what took place was of the nature of a family arrangement and that the appellants were estopped from disputing the validity of the adoption. On the third issue he held that the first respondent's possession of a share in the family properties, though undivided prior to 1898, had been adverse to the appellants and their father since 1887, and that consequently the appellants' claim was barred by the Limitation Act, 1877, Sched. II., art. 126. In view of his findings upon the second and third issues he dismissed the suit. The appellants thereupon appealed to the Court of the Judicial Commissioner, Central Provinces.

The appeal came on for hearing before the Additional Judicial Commissioner, who by his judgment delivered on July 26, 1909, decided in favour of the defendants (respondents). The learned Commissioner was of opinion that the possession of the first respondent had been adverse to the appellants since 1887, and that the claim of the second, third, and fourth appellants, who were not then born, was barred by the Limitation Act, 1877; but that the claim of the first appellant, assuming him to have been born in 1886 and thus prior to the commencement of the adverse possession of the first respondent, was saved by s. 7 of that Act. He was, however, of opinion that the acts of the appellants' father in admitting the first respondent to a joint enjoyment of the family property and in coming to a partition with him were binding upon the appellants, whether the respondents' adoption was valid or not. He therefore dismissed the appeal.

De Gruyther, K.C., and H. Mitra, for the appellants. There was upon the facts pleaded no ground for holding that the appellants' father acquiesced in the joint ownership of the first respondent: *Rewa Prasad Sukal v. Deo Dutt Ram Sukal*. (1) The admission by the plaintiffs' pleader was ambiguous. It is capable of being construed as meaning that previously to 1898 the first respondent was living "as if" he were a joint member of the family. But in any event the father's acquiescence is not necessarily binding upon the sons. The appellants cannot

be precluded from raising the question that the partition was unfair to them and not binding. The learned Judicial Commissioner was mistaken in his view that under the decision in *Balkishen Das v. Ram Narain Sahu* (1) it is necessary to shew that the partition was to the father's knowledge unfair and prejudicial. If the adoption was invalid it does not become effective unless by estoppel. The District Judge decided on the basis of estoppel by acquiescence on the ground that the first respondent had severed his connection with his natural family, but this appears from the plaint not to have been so. The view of the learned Judicial Commissioner that the suit was barred by limitation against the three younger sons, who were not born at the date when the joint possession is said to have commenced, is erroneous. The authorities upon which that view was based were founded on the law as then existing that in all cases where the validity of an adoption was in question a suit for a declaratory judgment had to be brought by the next reversioner. A child born more than twelve years after the adoption was held barred by the Limitation Act, 1877, Sched. II., art. 118, and his suit was not saved by s. 7 because the title had vested under s. 2, before his birth. Those decisions are, however, no longer law since the decision in *Muhammad Umar Khan v. Muhammad Niaz-Ud-Din Khan* (2), and the younger sons' claim is saved by s. 7 of the Limitation Act, 1877. Further, the eldest appellant is entitled to succeed on behalf of the joint family, and the younger sons are entitled to share in the relief as members of the joint family, whether or not a suit by them would have been barred.

Lowndes, for the first and second respondents. The appellants did not, either in the Courts below or by their case in the present appeal, allege that there had not in fact been acquiescence by their father. The point raised was solely as to the effect of the acquiescence. It is now too late for the appellants to put forward that there was no acquiescence. Further, the admission by the plaintiffs' pleader was unambiguous and could only mean that previously to 1908 the first respondent was in joint possession of the property and that the appellants' father acquiesced in his

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(1) (1903) L. R. 30 Ind. Ap. 139.

(2) (1911) L. R. 39 Ind. Ap. 19.

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being so. That the admission meant this is shewn by the issues which were settled after and upon it being made. The father's acquiescence was binding upon his sons both by estoppel and as an arrangement which he was entitled to make as manager of the joint family property : Mayne's Hindu Law, 7th ed., p. 755 ; *Jagan Nath v. Munna Lal*. (1) On the limitation point there are two distinct questions : (1.) Was the father barred, and if so did that bar the sons ? (2.) Were the sons nevertheless entitled to sue by virtue of the Limitation Act, 1877 ? If the adverse possession began in 1887, the father was barred under Sched. II., art. 126. Though there cannot be adverse possession as between members of a joint family, there is as regards a stranger to whom part of the family property is alienated. The claim of the appellants must be through their father and is consequently barred : *Radhabai and Ramachandra Konher v. Anantrav Bhagwant Deshpande*. (2) If, however, it should be held that the claim of the eldest appellant is saved by s. 7 of the Limitation Act, 1877, it is not necessary to consider whether the learned Judicial Commissioner was right in holding that s. 7 did not save the younger sons from being barred, since in that event it is conceded on behalf of the respondents that the younger appellants would be entitled to share in the relief granted to the eldest appellant. The suit will not lie in the form in which it is brought. The appellants by their plaint claim to recover the whole property, but during their father's life he represented the family and the sons had no claim to recover. The suit in its present form consequently does not lie. The appellants could only ask for partition. Upon partition it would be open to the first respondent to claim that in any event he was entitled as against the appellants' father.

De Gruyther, K.C., in reply. The form of the suit is right ; *Madho Pershad v. Mehrban Singh* (3) ; *Radha Proshad Wasti v. Esuf* (4) ; *Naranbhai Vaghjibhai v. Ranchod Premchand*. (5) No authorities were cited to shew that the plaintiffs were bound to

(1) (1894) I. L. R. 16 Allah. 231, at p. 233.

(2) (1885) I. L. R. 9 Bomb. 198, at p. 224.

(3) (1890) L. R. 17 Ind. Ap. 194.

(4) (1881) I. L. R. 7 Calc. 414.

(5) (1901) I. L. R. 26 Bomb. 141.

claim partition which they do not desire. Suits of the character of the present are so well recognized in India that the Limitation Act, 1877, and the Limitation Act, 1908, make special provision as to them. If the appellants had sued merely to recover their share of the joint family property the suit would have been dismissed upon the authority of *Rajaram Tewaree v. Luchmun Pershad*. (1)

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[SIR JOHN EDGE. The Courts of the Central Provinces are not governed by the decisions of the Bengal, Madras, or Bombay High Court, but they lean to those of the Allahabad High Court.]

The appellants took the right course in joining their father as a defendant. It would be competent for the Court upon making a decree in the suit to declare that the first respondent was entitled to stand in the shoes of the appellants' father : *Deendyal Lal v. Jugdeep Narain Singh* (2); *Baboo Hurdey Narain Sahu v. Pundit Baboo Rooder Perkash Misser*. (3) The real question in the appeal is whether the Board is satisfied that there has been a proper trial of the suit.

The respondent Kedarnath was not represented.

The judgment of their Lordships was delivered by

SIR SAMUEL GRIFFITH. This was a suit instituted—to use the words of art. 126 of Sched. II. to the Indian Limitation Act of 1877—“by a Hindu governed by the law of the Mitakshara, to set aside his father's alienation of ancestral property.” The plaintiffs, the appellants, are the four sons of the defendant Kedarnath. The defendants were one Jainarayan, Kedarnath, and certain assignees from the former. The case made by the plaint, so far as material to the present appeal, is that the plaintiffs and their father were the owners of a joint undivided ancestral estate subject to the Mitakshara law, and that Kedarnath, in October, 1898, improperly made a disposition of part of it by way of partition to the defendant Jainarayan. The relief formally claimed was that “each of the defendants may be ordered to deliver to them the possession of whatever

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(1) (1869) 12 Suth. W. R. 478.

(2) (1877) L. R. 4 Ind. Ap. 247.

(3) (1883) L. R. 11 Ind. Ap. 26.

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The suit was instituted on December 20, 1907. The first plaintiff was alleged to have been born on December 20, 1886, the other plaintiffs being younger. The plaintiffs alleged that the estate had descended to two brothers, Ramnath and Rambilas, neither of whom had issue; that in 1877 the former adopted the defendant Kedarnath; that Rambilas died in 1881 and Ramnath in 1883, whereupon Kedarnath became solely entitled; that about 1886 or 1887 the widow of Rambilas, whose name had previously, with the consent of Ramnath, been entered in the local register as a joint owner in place of Rambilas, adopted Jainarayan as the son of Rambilas, and that his name was thereupon entered as owner in her place; that the adoption of Jainarayan was invalid for various reasons stated; and that in 1898 Kedarnath "gave" a specific part of the estate to Jainarayan, who has since claimed and enjoyed the separate possession of it. Under these circumstances, the plaintiffs claimed restitution of the part so given.

Amongst other defences, Jainarayan set up that the plaintiffs are bound by the acquiescence of their father Kedarnath in the admission of Jainarayan to the family, and that the suit is barred by the Limitation Act.

In proceedings before the District Judge for the purpose of settling preliminary issues of law, the plaintiffs' pleader admitted that "plaintiffs' father had actually given possession of the property in suit to defendant No. 1 (Jainarayan) to enjoy it exclusively by himself in 1898. Previously he was living as a joint member and jointly enjoying the property by reason of plaintiffs' father's inaction and acquiescence in this mode of enjoyment." The case was decided in the Courts below upon the allegations in the plaint, together with this admission. The first three issues were finally settled as follows :—

1. Whether plaintiffs can maintain the suit in its present form without suing for partition;

2. Are plaintiffs bound by the acquiescence of their father in admitting defendant No. 1 into the family and allowing him a share in the property?

3. Since defendant No. 1 has been in joint possession of property with Kedarnath since 1887 and in separate possession of his share since 1897-98, has he acquired an absolute title to the property in dispute? If plaintiffs' father's claim is time-barred, has their claim become time-barred also?

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There was some controversy as to the effect of the admission already stated. But their Lordships think that, as the issues were settled in the presence of the parties, it must be construed in the sense recited in the third issue. The learned judge of first instance answered the first and second issues in the affirmative, and as to the third issue held that the defendant Jainarayan had acquired an absolute title to the property in suit by adverse possession for more than twelve years.

On appeal to the Court of the Judicial Commissioner, the learned Additional Commissioner held that as the first plaintiff had instituted the suit within three years of attaining his majority, he was entitled to the benefit of s. 7 of the Limitation Act of 1877, and the suit was not barred as against him, but he held that it was barred as against his younger brothers, who were born after the commencement of what he regarded as the adverse possession of the defendant Jainarayan. It was, however, conceded before this Board, and, as their Lordships think, rightly conceded, that if the first plaintiff succeeds in the suit his younger brothers born before a partition of the estate will be entitled to share in the relief.

The learned Additional Commissioner also held that the first plaintiff was bound by his father Kedarnath's acquiescence in Jainarayan's joint enjoyment of the family property and consent to a partition with him, since in such acquiescence and consent he must be held to have acted in a representative and not in a personal capacity.

The basis of the suit is that the adoption of Jainarayan was wholly invalid, in which case he was in the view of the law an absolute stranger. It is not disputed that the validity of an adoption may be contested by persons prejudicially affected by it. And it seems to their Lordships to be clear that, although a partition made by a Hindu father may under some circumstances bind his minor sons, as was held by this Board in *Balkishen Das*

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v. *Ram Narain Sahu* (1), yet if on the partition a share is given to an absolute stranger the partition may be impeached as a disposition of property made without consideration, unless it can be supported as a bona fide compromise of a disputed claim. There are no materials before the Board to enable them to form a conclusion in favour of the first respondent on this ground, as suggested by the learned Additional Judicial Commissioner, even if such a case had been set up by him.

Their Lordships are therefore of opinion that if the adoption of Jainarayan was wholly invalid the plaintiffs would be entitled to succeed in the absence of any other defence.

With respect to the form of suit, it was rightly pointed out by the learned counsel for the appellants that to deny any relief except in a suit for partition would be to deny the right of relief altogether, since the basis of their claim is that they are still entitled to the estate as a joint undivided estate, and desire to enjoy it as such. It may well be, however, that, as between Kedarnath and Jainarayan, the latter may be entitled to insist that he stands in the shoes of the former as to the share which would come to Kedarnath upon a partition; and that the Court, if that position were established, would itself, at Jainarayan's instance, decree a partition as between the plaintiffs on the one hand and Kedarnath on the other. Their Lordships think that on the present pleadings it is open to Jainarayan to set up such a case, but express no opinion as to its validity either in law or fact.

Under these circumstances, their Lordships, being of opinion that they cannot, on the materials before them, finally determine the rights of the parties, will humbly advise His Majesty to set aside the judgments and decrees appealed from, and remand the suit for trial, with a declaration that it is competent for the Court, in the event of the respondent Jainarayan failing in his other defences, to make the whole or any part of the relief granted to the plaintiffs conditional on their assenting to a partition so far as regards Kedarnath's interest in the estate, so as to give effect to any right to which the respondent may be entitled claiming through Kedarnath.

The respondents must pay the costs of the hearing on the preliminary issues in the District Court and the costs of the appeal to the Judicial Commissioner, but there will be no order as to the costs of this appeal.

Solicitor for appellants : *Edward Dalgado*.

Solicitors for first and second respondents : *T. L. Wilson & Co.*

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DURGA PRASAD SINGH PLAINTIFF ;

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RAJENDRA NARAYAN BAGCHI AND OTHERS DEFENDANTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

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*Mining Lease—Parcels—Area stated within specified Boundaries—Alleged
Deficiency—Abatement of Rent.*

The appellant was lessor and the respondents lessees] under a mining lease, the terms of which were contained in a kabuliyat, granting the rights of cutting, raising, and selling coal beneath “400 bighas of land, described in the schedule below, in mauza Dobari ” ; the schedule specified boundaries and added “right in the coal underneath the 400 bighas of land within these boundaries.” In a suit to recover arrears of rent the respondents alleged that they were in possession of less than 400 bighas and claimed to be entitled to an abatement of rent :—

Held, (1.) that the construction of the kabuliyat as to land included in the lease could not be varied by evidence of the negotiations which led to the contract or by evidence that there were not 400 bighas within the specified boundaries ; (2.) further, that the respondents had failed to prove what was the area in fact contained within the boundaries or that of which they had been given possession.

APPEAL from a judgment and decree of the High Court (August 26, 1909) which modified a decree of the Subordinate Judge of Manbhum (April 27, 1907).

The main question in the appeal was whether the respondents were entitled to any abatement of the rent fixed under a registered

* *Present* : LORD ATKINSON, LORD SHAW OF DUNFERMLINE, SIR JOHN EDGE, and MR. AMEER ALI.

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kabuliyat dated December 3, 1894, of a mukarrari maurusi mining settlement of land. The kabuliyat was executed by the first respondent on behalf of himself and the other respondents, his co-sharers, in favour of the predecessor in title of the appellant, who executed a corresponding patta. By the terms of the lease, as appearing from the kabuliyat, the lessor granted the rights of cutting, raising, and selling coal underneath "400 bighas of land, described in the schedule below, in mauza Dobari." The schedule specified the boundaries and concluded "right in the coal underneath the 400 bighas of land within these boundaries." By the kabuliyat the respondents agreed to pay an annual mukarrari rent of Rs. 2800, which, it provided, should "never on any account be varied," and to pay interest on default. The terms of the kabuliyat are more fully set out in the judgment of their Lordships. In December, 1898, the first respondent wrote to the lessor that the rent was too high for the quality of the coal found in the mines. The lessor by a letter dated December 7, 1898, agreed to accept a reduced rent amounting to Rs. 2000. This letter was not registered to satisfy the requirements of the Indian Registration Act (III. of 1877), s. 17 (b). The lessees paid this reduced rent for two years, after which the appellant, having succeeded the original lessor, refused to accept it. On April 26, 1902, the appellant instituted a suit in the Court of the Subordinate Judge of Manbhum against the respondents, alleging that the latter had worked the coal beyond the boundaries prescribed in their lease, and claiming, among other relief, an injunction. The Subordinate Judge in that suit held that the respondents were actually in possession of 346 bighas and that with the exception of 1600 square feet the respondents were in possession of these 346 bighas under their lease. The Subordinate Judge granted an injunction restraining the respondents from carrying on operations outside mauza Dobari. The present appellant appealed to the High Court, which dismissed the appeal. In the judgment of that Court the following passage occurs: "The area demised to the defendants was 400 bighas within Dobari, but they actually hold only 346 bighas. This actual area belongs to Dobari if the boundaries of that village be taken according to the Thakbast map, but only 257 bighas of it belongs to that village according

to the Revenue Survey map. It is possible that 346 bighas were leased to the defendants as 400 bighas, but it seems impossible that only 257 bighas could have been leased to them as 400."

The present suit was commenced by the appellant on August 16, 1906, in the Court of the Subordinate Judge of Manbhum against the respondents for the recovery of arrears of rent at Rs. 2800 per annum together with interest and cesses. The respondents pleaded (inter alia) that they were in possession of only 274 bighas out of 400 bighas referred to in the kabuliyat and claimed to be entitled to an abatement of the rent, and they further relied upon the letter of December 7, 1898, as an agreement to reduce the rent to Rs. 2000. They pleaded tenders of the rent at the reduced rate which they had made from time to time.

Both parties appealed to the High Court, which delivered judgment on August 26, 1909, holding that since the letter of December 7, 1898, was not registered under the Indian Registration Act (III. of 1877), s. 17 (b), it could not, having regard to s. 49 of that Act, be admitted in evidence, and that there was no consideration to support it as an agreement. On this point the respondents did not appeal. The High Court, dealing with the claim for abatement of rent on the ground of the alleged deficiency of area, held that the true extent of the land demised was 400 bighas, that the respondents were in possession of only 275 bighas, and that they were in law entitled to the abatement of rent which they claimed. In the result both appeals were allowed in part.

De Gruyther, K. C., and Parikh, for the appellant. On the true construction of the kabuliyat what was demised was the land within the boundaries specified in the schedule. The statement as to the number of bighas was merely descriptive. The evidence as to what took place at the time the lease was granted shews that the area stated was mere guesswork. Both Courts in India found that the respondents were put into possession of the land contained within the boundaries specified. If they are now in possession of less it is solely in consequence of the injunction granted in the 1902 suit, from which the respondents did not appeal. If the lessor did not put the respondents into possession of the land to which they were

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entitled they should have asked for specific performance under the Specific Relief Act (I. of 1877), s. 15. [The Indian Contract Act (VII. of 1872), ss. 13 and 20, was referred to.]

Sir Erle Richards, K. C., and *Dube*, for the respondents. It was fully established at the trial that the respondents are in possession of only 275 bighas. The evidence on this point was unchallenged and uncontradicted. Rescission of the contract would be of no advantage to the respondents since they have sunk shafts and done other work upon the land. Where a vendor is unable to give possession of the whole of the land contracted for the purchaser is entitled to have specific performance as to part with compensation for the deficiency: *Williams' Vendor and Purchaser*, ed. 1910, vol. i., p. 725; *Mortlock v. Buller* (1); *Hill v. Buckley* (2); *McKenzie v. Hesketh*. (3) The last decision referred to is with reference to a lease. The effect of the injunction was to dispossess the respondents by title paramount, and under the circumstances of the case they are entitled to retain possession of the residue and pay a rateably reduced rental: *Woodfall's Landlord and Tenant*, 19th ed., 1912, p. 478; *Doe d. Vaughan v. Meyler* (4); *Gopamund Jha v. Lalla Gobind Pershad*. (5) The facts of the present case do not materially differ from those in *Imambandi Begum v. Kamleswari Pershad* (6), and the same principle applies.

De Gruyther, K.C., in reply, referred to *Llewellyn v. Lord Jersey* (7), also to the Assam Land Revenue Manual, p. 133.

The judgment of their Lordships was delivered by

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Nov. 3.

SIR JOHN EDGE. This is an appeal by Raja Durga Prasad Singh, the plaintiff, from a decree, dated August 26, 1909, of the High Court at Calcutta, which varied a decree, dated April 27, 1907, of the Subordinate Judge of Manbhum in a suit for arrears of rent, cesses, and interest, which was brought on August 15, 1906, in the Court of the Subordinate Judge of Manbhum, upon a mukarrari kabuliyat of December 3, 1894.

(1) (1804) 10 Ves. 292.

(2) (1811) 17 Ves. 394.

(3) (1877) 7 Ch. D. 675.

(4) (1814) 2 M. & S. 276.

(5) (1869) 12 Suth. W. R. 109.

(6) (1894) L. R. 21 Ind. Ap. 118.

(7) (1843) 11 M. & W. 183.

The kabuliyat was executed by Rajendra Narayan Bagchi, now dead, who, with others who derived title through him, was a defendant to the suit. The patta, corresponding to the kabuliyat, was executed by Raja Jaimangal Singh, now dead, the original lessor, whose interest vested before suit in the plaintiff. In the kabuliyat, Rajendra Narayan Bagchi acknowledged having received from Raja Jaimangal Singh a patta corresponding to the kabuliyat, and stated that "On the agreement that the heirs and representatives of both of us, yourself and myself, shall be bound by all the terms and conditions of the patta and this kabuliyat, I execute this mukarrari maurusi kabuliyat." The patta has not been put in evidence in this suit, but it has not been suggested by either side that it differs in any material respect from the kabuliyat or that anything turns upon the construction of the patta.

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The material words of the kabuliyat so far as it affects the matters in issue in the suit are as follows :—

"I, having applied to get from you a settlement of the rights of cutting, raising, and selling, etc., the coal underneath the 400 bighas of land described in the schedule below, within mauza Dobari, in pergunnah Jharia, recorded in towzi No. 8 of the district Manbhum Collectorate, and which is within the zamindari owned and possessed by you in ancestral right, and you having granted my application, I hereby execute to you a mukarrari (permanent) maurusi kabuliyat for 400 bighas of land as per boundaries below, within the said mauza and which will be enclosed by me on putting up masonry pillars at my own cost and according to demarcation made by you or your taking from me Rs. 8400 as salami, and fixing an annual mukarrari rental of Rs. 2800 for the rights in coal under the said 400 bighas of land; and I agree that year after year and according to the instalments, I shall pay to you into your zamindari kachahri, every year in three instalments, the fixed rental and also the road and public works cesses and other taxes and cesses payable by me according to law, that may be imposed in future by Government, namely, in Sraban of each year, Rs.900, in Aghran Rs. 900, and in Chaitra Rs.1000 out of the rental fixed; and after taking dakhilas for the same according to the usage in vogue in

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your serishta, I shall thereupon enjoy and continue to enjoy from generation to generation all the rights in the coal under the 400 bighas by cutting, raising and selling the same, after making the said coal fit for the market, and vested with the power of gift, sale and all kinds of assignment of the same according to pleasure. The rental fixed shall never on any account be varied. . . . If I fail to pay any instalment of the rent or cesses, then for the unpaid instalment money, I shall pay interest at the rate of rupee one per cent. per mensem from the date of the lapsed instalment till the date of payment. If I fail to pay six consecutive instalments of the rent or cesses, etc., then on the next date of instalment you will be entitled to bring the settled coal lands into your khas possession According to this kabuliyat I become vested with the right and title to the coal under the settled land from to-day. I shall have to pay nothing for the year 1301 B. S. as rent or cesses, etc. From the year 1302 B.S., I shall continue to pay the entire rent Rs.2800 by proper instalments. You are not liable to me for the return of the above amount of salami (premium) or for any other matter."

The schedule which is referred to in the kabuliyat is as follows:

SCHEDULE OF THE BOUNDARIES.

"On the south—boundary line of mauza Fatehpur, as per thak.

"On the west—boundary line of mauza Jharia Khas, as per thak.

"On the east—border of the 100 bighas of land settled with Gopal Krishna Roy and others and the Chatkari jore.

"On the north—boundary line of mauza Bherakata, as per thak, and the Chatkari jore.

"Right in the coal underneath the 400 bighas of land, within these boundaries."

The plaintiff in his plaint alleged that default had been made in the payment of instalments of the fixed rent and of the cesses, and claimed a decree for Rs.23,868 in respect of principal and interest and further reliefs. So far as is now material, the defendants to this suit by their written statement alleged that

the coal underneath 400 bighas of land in mauza Dobari had been demised by Raja Jaimangal Singh to the defendant Rajendra Narayan Bagchi ; that they had not been given possession of the underground rights of the 400 bighas of land ; that they were entitled to an abatement of the rent which had been fixed by the kabuliyat ; and that they had made tenders of the rent which, according to them, was due, and consequently denied that the interest which was claimed by the plaintiff was payable. Their tenders were based upon a reduced rent. It appears that the grounds upon which the defendants alleged that the plaintiff was not entitled to the rent fixed by the kabuliyat, and was entitled only to a reduced rent, were that Raja Jaimangal Singh had, according to them, in 1898 reduced the fixed rent from Rs. 2800 a year to Rs. 2000 a year on the representation of Rajendra Narayan Bagchi that the coal which had been demised was of inferior quality and could not be sold as steam coal, and that under part of the land no coal was found ; and that by an injunction which was decreed on December 15, 1902, in a suit which had been brought by the present plaintiff on April 26, 1902, the right of the defendants to work coal under the demise was restricted to an area of 274 bighas 4 cottahs. The defendants further alleged in their written statement that they had paid the cesses direct into the Collectorate, and denied that the plaintiff was entitled in law to get any cesses. The defendants claimed to set off pro tanto certain costs and interest thereon which had been allowed to them as against the plaintiff by the decrees in the suit of April 26, 1902.

The Subordinate Judge of Manbhum held in this suit that the rent fixed by the kabuliyat had been reduced by Raja Jaimangal Singh to Rs. 2000 a year, and that the defendants were not entitled to any further reduction. He also held that the defendants had tendered the amounts of the reduced rent, and consequently that the plaintiff was not entitled to interest in respect of the amounts so tendered. The Subordinate Judge also found that the defendants had paid the cesses direct to the Collector, and were not liable to pay them to the plaintiff. The Subordinate Judge properly decided that the defendants were entitled to set off the costs, with interest, awarded in the suit of April 26, 1902.

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J. C. From the decree of the Subordinate Judge each side appealed to
1913 the High Court at Calcutta.

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The High Court found that the document by which the defendants sought to prove that Raja Jaimangal Singh had agreed to reduce the rent from Rs.2800 to Rs.2000 a year was, for want of registration, inadmissible in evidence to vary the terms of the kabuliyat, and that the alleged agreement for reduction of rent was without consideration and was not enforceable. On both points their Lordships agree with these findings of the High Court. There was no reliable and admissible evidence to prove that Raja Jaimangal Singh ever bound himself to accept a reduced rent. The fact that he did for some years accept a reduced rent is consistent with the reduction having been a mere voluntary and temporary abatement.

The High Court, having found on evidence not contained in the kabuliyat that the rent of Rs. 2800 a year had been fixed by Raja Jaimangal Singh and Rajendra Narayan Bagchi on the assumption that within the boundaries specified in the schedule to the kabuliyat there were in fact 400 bighas, concluded that the description by boundaries of the subject of the demise might be disregarded, and that the demise was a demise of 400 bighas, whether 400 bighas were or were not contained within the specified boundaries, and finding on the evidence of an amin, which their Lordships will later consider, that within the specified boundaries there were not 400 bighas, and that the defendants were in possession of only 275 bighas 3 cottahs 10 chittaks, the High Court decided that the defendants were entitled to a proportionate abatement of the fixed rent.

Although, in their Lordships' opinion, the question as to what had been demised in 1894 turned upon the true construction of the kabuliyat, and that construction could not be varied by extraneous evidence as to the negotiations which led up to the contract which was, in fact, made, or by evidence shewing that within the boundaries specified in the schedule to the kabuliyat there were not 400 bighas of land, their Lordships consider that it will be satisfactory to ascertain what evidence, if any, there is as to the actual bigha area of land within the boundaries specified in the schedule to the kabuliyat, and how it happened that th

right of the defendants to work coal was, at the time when the rent sued for accrued due, restricted, apparently, according to the High Court, to the coal under 275 bighas 3 cottahs 10 chittaks.

Before the lease by patta and kabuliyat was made the land within the boundaries specified in the schedule to the kabuliyat had not been measured. There is no evidence to shew that the land had, at any time, been measured by, or on behalf of, Raja Jaimangal Singh. The defendant Rajendra Narayan Bagchi, in his evidence in this suit, stated, "The 400 bighas were fixed by guess. It was not fixed by any measurement. When I took the settlement (the lease) it was settled that I would get 400 bighas of land. It was also settled that if the land was found to be less the deficit would be made good." He admitted that some months before April 26, 1902, he had the coalfield in his possession measured by an amin, but he stated that he did not remember how much land had been ascertained by that measurement. He said, "I never tried to ascertain the area myself." No evidence has been brought to their Lordships' attention which suggests that Rajendra Narayan Bagchi or any of the other defendants ever complained to Raja Jaimangal Singh that they had not been placed in possession of the area of coalfield which had been demised in 1894. Raja Jaimangal Singh, who accepted in 1898 and subsequently a reduced rent, did so on the representation of Rajendra Narayan Bagchi that the coal was of inferior quality and was not saleable as steam coal, and that under part of the lands no coal had been found, and not on any representation or complaint that there were not 400 bighas of land within the boundaries specified in the schedule to the kabuliyat.

On April 26, 1902, the present plaintiff brought a suit against Rajendra Narayan Bagchi and others, who are either defendants to this suit or are represented in title by defendants to this suit. In his plaint of 1902 Raja Durga Prasad Singh alleged that the defendants had wrongfully entered upon and worked his coal in mauza Jharia Khas, and claimed damages and a perpetual injunction restraining the defendants from cutting and raising the coal in Jharia Khas. In that suit of 1902 a Civil Court amin was deputed to make measurements and to

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make a report. He made a report which is dated September 29, 1902. It appears from that report that for the purpose of measuring and preparing a map he received but little useful or practical assistance from those who represented the plaintiff, and that the defendants pointed out to him the lands of which they alleged that they had been given possession under the demise of 1894. According to the amin's report the lands so pointed out by the defendants measured 346 bighas 4 cottahs 4 chittaks, but he reported that the boundaries of the lands which were pointed out to him by the defendants did not agree with the boundaries as specified in the kabuliyat. In his report the amin stated that of the 346 bighas 4 cottahs 4 chittaks only 257 bighas 3 cottahs 4 chittaks were within mauza Dobari. It is to be observed that the lands which the defendants pointed out to the amin included part of mauza Jharia Khas, where the defendants were alleged to have committed the trespass, and it is also to be noticed that the plaintiff in the suit of 1902 had alleged in his plaint that he believed that the coal in Jharia Khas was of a better quality than the coal which had been demised to the defendants, and found a ready sale in the market. The amin prepared a map which was in evidence in the suit of 1902, and is in evidence in this suit. According to his report of 1902, it was not possible for him to lay down on the ground the northern, western, and southern boundaries of the defendants' holding, as there was no field-book to shew the bearing at the station points and the distances of the chain lines. The amin was examined as a witness in this suit on March 27, 1907, when he stated that he had made the map by relaying on it the lands of the Revenue Survey map and the Thakbast map. It is to be observed that the boundaries according to the Survey map and the Thakbast map did not agree. In his evidence given in this suit the amin stated that the area of the lands lying within the boundaries which were specified in the schedule to the kabuliyat was 275 bighas 3 cottahs 10 chittaks, and that in mauza Dobari, according to the Thakbast map, there are 788 bighas 15 cottahs and 2 chittaks of land. If the statements as to areas, which will later be referred to, contained in the judgment of the Subordinate Judge in the suit of 1902 and in the judgment of the High Court in Appeal in

that suit be correct, the amin must have confounded the areas shewn by the Revenue Survey map with the areas shewn by the Thakbast map. No reliable conclusion as to areas can be drawn from the report or from the evidence of the amin.

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The Subordinate Judge in the suit of 1902, in his judgment of December 15, 1902, stated that "The amin's report shews that out of the 400 bighas let out to the defendants, they are in possession of 346 bighas 4 cottahs and 4 chittaks only. Measuring, according to the Survey map, 86 bighas and 8 cottahs of this fall within mauza Jharia Khas and Fatehpur, and 2 bighas 13 cottahs and 5 chittaks fall within mauza Bherakata, and 257 bighas 13 cottahs and 4 chittaks only fall within mauza Dobari. But measured according to the Thakbast map, the whole of the land in the defendants' possession, excepting 1600 square feet, falls within mauza Dobari." In that suit the Subordinate Judge found that the defendants had trespassed on the plaintiff's coal to the extent of 1600 square feet. On December 15, 1902, the Subordinate Judge "decreed that an injunction be issued to the effect that the defendants do not carry on operations outside mauza Dobari, as delineated in the map by the Civil Court amin, according to the Thakbast map, and that the remaining portion of the claim be dismissed." Except that an injunction was granted, the suit was dismissed with costs. Whether intentionally or carelessly it is difficult to say, but the injunction which the Subordinate Judge granted was wider in its operation than was the injunction which had been asked for in the plaint of that suit. The Subordinate Judge should have confined himself to the question which he had to determine, which was whether the defendants had committed a trespass by working coal in the plaintiff's mauza Jharia Khas, and having found that the trespass had been committed, he should have confined the injunction to be granted to the injunction which the plaintiff had asked for, namely, an injunction restraining the defendants from trespassing in mauza Jharia Khas. The Subordinate Judge was not concerned with the extent of the area demised in 1904 in mauza Dobari. The result is that the defendants are restrained from working coal outside the limits of mauza Dobari, as delineated, correctly or incorrectly, by the amin in his map,

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From the decree of December 15, 1902, of the Subordinate Judge, the plaintiff appealed to the High Court at Calcutta. The defendants submitted themselves to the injunction which had been granted, and did not appeal. The learned judges of the High Court who heard the appeal stated in their judgment that "The area demised to the defendants was 400 bighas within Dobari, but they actually hold only 346 bighas. This actual area belongs to Dobari, if the boundaries of that village be taken according to the Thakbast map, but only 257 bighas of it belong to that village according to the Revenue Survey map. It is possible that 346 bighas were leased to the defendants as 400 bighas, but it seems impossible that only 257 bighas could have been leased to them as 400." The High Court dismissed the appeal with costs. But whatever may be the area in bighas within mauza Dobari of the land which the defendants pointed out to the amin as being in their possession, it is obvious to their Lordships that the Subordinate Judge and the High Court considered that the defendants had 346 bighas of land within mauza Dobari underneath which they might lawfully continue to work the coal under their kabuliyat, and that the Subordinate Judge had not intended that the injunction which he was granting should have the effect of reducing to 257 bighas the area in mauza Dobari within which the defendants might lawfully work the coal under the kabuliyat. Their Lordships have no means of ascertaining what was in bigha measurement the area in mauza Dobari to which the defendants were restricted by the injunction of December 15, 1902, and whatever that area may in fact be, it must be borne in mind that there is no evidence to prove that the lands which the defendants pointed out to the amin were the lands of which they had, in fact, obtained possession in 1894.

It was for the defendants to make out a case, if they had one, for an abatement of the fixed rent. On this part of the case their Lordships find that the defendants have not proved how many bighas in fact were contained in the area of mauza Dobari which is within the boundaries which are specified in the schedule to the kabuliyat, and they have not proved the area in bighas

within those boundaries of which they were put in possession. They have not proved that the area which they pointed out to the amin as the area of which they were in possession was the area of which they obtained possession under the kabuliyat. They have not proved that otherwise than by the action of the Court of the Subordinate Judge in the suit of 1902, in granting the injunction in the form in which it was granted, and by their own neglect to appeal from that decree, they have been deprived of the right to work any coal which otherwise they would have been entitled to work under the demise. The action of the Subordinate Judge in granting the injunction in the form in which it was granted gave the defendants no right which they could enforce by suit or of which they could avail themselves as a defence to the suit for the fixed rent, although the injunction probably restricted their right to work the coal which had been demised in 1894; they had their remedy by way of appeal from the decree which granted the injunction, but they did not avail themselves of it. In their Lordships' opinion the defendants have failed to prove any facts which would entitle them to any abatement of the rent fixed by the kabuliyat. It follows from what their Lordships have said that the tenders in respect of rent, and interest upon arrears of rent, which the defendants relied upon, having been tenders based on a reduced rent, were not good tenders, either as tenders of rent, or of interest on arrears of rent, and were ineffective.

The High Court in the appeal in this suit found that the defendants had not proved that they had paid to the Collector the cesses and taxes which under the kabuliyat they were bound to pay to the plaintiff, and gave the plaintiff a decree for Rs.361.3.0 in respect of cesses, calculated on a reduced rent; the plaintiff is entitled to recover the sum of Rs. 525 in respect of cesses, the only defence pleaded as to the claim in respect of cesses having failed.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, and that the decree of the High Court should be varied by decreeing the appellant's claim for Rs.23,868 less Rs.3083.7.9 costs, due by the appellant to the respondents in respect of the previous suit of April 26, 1902,

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with interest at the rate of Rs.6 per centum per annum from the date of suit until realization on the balance decreed, namely, on Rs.20,784.8.3., with costs in the Court of the Subordinate Judge, and on appeal in the High Court.

The respondents must pay the costs of this appeal.

Solicitor for appellant : *Edward Dalgado*.

Solicitors for respondents : *W. W. Box & Co.*

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RAMESHWAR KUMAR APPELLANT ;

AND

THE COLLECTOR OF GAYA RESPONDENT.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Administration—Court Fees—Inventory—Proceedings to amend Valuation—Limitation—Probate and Administration Act (V. of 1881), s. 98—Court Fees Amendment Act (XI of 1899) s. 19H, sub-s. 4.

The six months within which the Collector may move under the Court Fees Amendment Act, s. 19H, to obtain an amended valuation of an estate in respect of which letters of administration have been granted runs from the date of the exhibition of an inventory to satisfy the Probate and Administration Act, 1881, s. 98, and not from the date when the District Judge holds that a sufficient inventory has been exhibited.

Documents filed in another suit cannot be taken in conjunction with lists exhibited by an administratrix for the purpose of constituting a sufficient inventory.

APPEAL from a judgment and order of the High Court (May 25, 1909) affirming a judgment and order of the District Judge of Gaya (March 2, 1909).

The question for determination in the appeal was whether or not the Collector was by reason of the proviso to s. 19H, sub-s. 4, of the Court Fees Amendment Act, 1899, precluded from moving under that section for an amended valuation of the

**Present* : LORD SHAW OF DUNFERMLINE, LORD MOULTON, SIR JOHN EDGE, and MR. AMEER ALI.

property and assets of an estate of which letters of administration with the will annexed had been issued.

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On March 31, 1890, Raja Ran Bahadur Singh died, leaving a will by which he devised and bequeathed certain villages to the appellant, his son's wife, for her maintenance, and the residue of his estate to his granddaughter. An order was made for the issue of letters of administration with the will annexed to the granddaughter, but she died without taking out administration. The executors of her will, namely, the appellant and the testator's husband, applied for and were granted probate in January, 1895. The Court fees paid amounted to Rs. 22,000, being upon a valuation of the estate at 11 lakhs of rupees. On August 13, 1902, the other executor having died, the appellant applied under the Probate and Administration Act, 1881, s. 20, for letters of administration of the estate of Raja Ran Bahadur Singh with the will annexed. She again estimated the value at 11 lakhs of rupees and the Court fees payable at Rs. 22,000. An order was made for letters to issue and for notice to be given to the Collector of Gaya.

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On May 13, 1905, a list of movable properties belonging to the estate, but without a valuation, was filed by the appellant in the District Court in response to a notice by the Collector under the Probate and Administration Act (V. of 1881), s. 98, sub-s. 3. A copy of this list was sent to the Collector. On July 28, 1905, the Collector applied to the District Judge for a list of the movables, and a list with a detailed valuation was supplied to him. This list was one prepared under the order of the District Judge shortly after the death of Raja Ran Bahadur Singh in 1890, since which date it had been on the file of the Court.

On May 21, 1907, the Collector applied to the District Judge to order the appellant to exhibit an inventory of the estate as required by the Probate and Administration Act, 1881, s. 98, and an order to that effect was made. The appellant applied to the District Judge to cancel this order upon the ground that an inventory had already been exhibited. The District Judge on September 27, 1907, ordered as follows: "From the office report it appears that an inventory is already on the record. No further action is necessary." In January, 1908, the District

J. C. Judge wrote to the Collector that "an inventory having already
 1913 been filed and accepted by the Court no further inventory can
 — be called for."

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On July 16, 1908, the Collector applied under the Court Fees Amendment Act (XI. of 1899), s. 19H, sub-s. 3, to inquire into the valuation of the estate. By her petition of objection the appellant pleaded that an inventory had been exhibited and accepted by the District Court more than six months before the proceedings, which were consequently out of time under the proviso to the sub-section above referred to.

On September 19, 1908, the District Judge, not being the judge who had made the order of September 27, 1907, delivered judgment against the appellant's contention and directed an inquiry into the true value of the property. The result of this inquiry was that the estate was found to be greatly undervalued.

The appellant obtained a rule nisi from the High Court under the Code of Civil Procedure, 1908, s. 115. Upon cause being shewn the High Court discharged the rule and affirmed the decision of the District Judge. It became unnecessary to decide whether the High Court had jurisdiction under s. 115 to set aside or vary the order of the District Judge.

De Gruyther, K. C., and *Dube*, for the appellant. The District Judge in 1907 was satisfied that a sufficient inventory had been exhibited. The six months within which the Collector could move to amend the valuation under the Court Fees Amendment Act, 1899, s. 19H, sub-s. 4, must be taken to run from that date. If this is not so the administratrix may be liable for an indefinite period to make an amended valuation. In considering whether a sufficient inventory was exhibited the District Judge in 1907 rightly took into account documents filed in his Court in relation to the same estate.

Sir Erle Richards, K.C., and *Dunne*, for the respondent, were not called upon.

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The judgment of their Lordships was delivered by

LORD SHAW OF DUNFERMLINE. This is an appeal from a judgment and order of date May 25, 1909, which was pronounced by

the High Court of Judicature at Fort William in Bengal, and which affirmed a judgment and order of date September 23, 1908, and March 2, 1909, of the District Judge of Gaya.

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The present proceedings were instituted on July 16, 1908, by an application which was made by the Collector to the District Court under s. 19H, sub-s. 4, of Act XI. of 1899. Before reading that section it may be stated that the general nature of the application was to declare that no inventory of the estate of the deceased as required by law had been filed, and that the appellant was not willing to amend the valuation of the estate to the satisfaction of the Collector. In the defence lodged to those proceedings, this declinature and inability were reaffirmed by the appellant, and accordingly the proceedings have taken their course.

The section of the Act of 1899 to which particular reference is made defines the function of the Collector in the following terms :—"The Collector, within the local limits of whose revenue jurisdiction the property of the deceased or any part thereof is, may at any time inspect or cause to be inspected, and take or cause to be taken copies of the record of any case in which application for probate or letters of administration has been made ; and if, on such inspection or otherwise, he is of opinion that the petitioner has underestimated the value of the property of the deceased, the Collector may, if he thinks fit, require the attendance of the petitioner (either in person or by agent) and take evidence and inquire into the matter in such manner as he may think fit, and, if he is still of opinion that the value of the property has been underestimated, may require the petitioner to amend the valuation."

The Collector, having a strong opinion as to the valuation emerging as a lump figure in the previous proceeding, initiated these proceedings under discussion. What the appellant before their Lordships pleads is that the action or proceeding on the part of the Collector is excluded by the proviso of sub-s. 4 of the statute last quoted. That proviso is "that no such motion shall be made after the expiration of six months from the date of the exhibition of the inventory required by section 277 of the Indian Succession Act, 1865, or, as the case may be, by section 98 of the Probate and Administration Act, 1881."

J. C. It is, in the opinion of their Lordships, not a justifiable
1913 construction of this proviso to date the period of running from
RAMESHWAR anything less than the lodging of the inventory required by the
KUMAR statute. It will not satisfy this proviso that six months have
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COLLECTOR elapsed from a period when a certain document, which might be
OF GAYA. classed as or denominated an inventory, satisfied a District Judge
 or any judge. What he has to be satisfied of is that the
 punctum temporis from which the six months runs is the lodging
 of an inventory as required by s. 98. It was admitted by the
 learned counsel for the appellant that accordingly the correct
 decision to be arrived at here depended upon the construction of
 certain words in s. 98, and as those are of general importance
 the following citation is made: "An executor or administrator
 shall, within six months from the grant of probate or letters of
 administration, exhibit in the Court by which the same has or
 have been granted an inventory containing a full and true
 estimate of all the property in possession, and all the credits, and
 also all the debts owing by any person or persons to which the
 executor or administrator is entitled in that character." The
 remainder of the section has no bearing on the subject in dispute
 in these proceedings.

Their Lordships are clearly of opinion that no inventory satisfies this statutory requirement which omits the essential of this detail, namely, that its contents shall include "a full and true estimate of all the property in possession." This being the statutory provision it is not alleged by the appellant that any one document did contain such a full and true estimate. The argument presented to their Lordships was that by massing together a variety of documents, including two which will now be referred to, and a mass of documents in another case, none of which have been brought in detail before the notice of the Board, there was, in the result, produced to the Court an inventory containing a full and true estimate.

In their Lordships' opinion the first objection to this operation, even although the operation itself as distinguished from the production of one document containing the details were legitimate, is that the first document to which reference is made is a list of the immovable property belonging to the deceased.

It has been not obscurely suggested in these proceedings that the immovable property bore the relation to the movable property of no less than at least nine in ten. So that with regard to nine-tenths of the estate of the deceased nothing is supplied except a list of the properties, a list without a single figure, and containing nothing, even by approximation to the words of the statute, in the nature of a full and true estimate of the property in possession.

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In their Lordships' opinion that is sufficient for the disposal of the case. Their Lordships are satisfied that a just conclusion has been arrived at by the Courts below, and they will therefore humbly advise His Majesty that this appeal should be dismissed, and that the appellant should pay the costs.

Solicitors for appellant : *W. W. Box & Co.*

Solicitor for respondent : *The Solicitor, India Office.*

GEORGE STAUNTON CLIFFORD AND OTHERS PETITIONERS;

AND

THE KING-EMPEROR RESPONDENT.

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ON APPEAL FROM THE CHIEF COURT OF
LOWER BURMA.

*Practice—Criminal Proceedings—Special Leave to Appeal—Limit of
Jurisdiction.*

Leave to appeal from convictions and sentences on the grounds of alleged irregular conduct of the proceedings, misdirection of the jury, and misreception of evidence refused, the case not coming within the principle as laid down in *In re Dillet* (1887) 12 App. Cas. 459.

PETITION for special leave to appeal from convictions upon a trial before Twomey J. (April 11, 1913) and a jury and sentences and from a judgment (June 20, 1913) of the Chief Court upon questions reserved for the decision of that Court.

The facts as appearing from the petition were shortly as

* *Present* : VISCOUNT HALDANE L. C., LORD MOULTON, LORD PARKER OF WADDINGTON, and LORD SUMNER.

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follows. The petitioners were two directors and the general manager of the Bank of Burma, Limited, a company incorporated in Burma under the Indian Companies Act, 1882. By an order of the Chief Court made on June 27, 1912, the company was ordered to be wound up and an official liquidator was appointed. The official liquidator filed a complaint in the Court of the district magistrate of Rangoon alleging that the petitioners had by knowingly issuing a false balance-sheet for the half-year ending June 30, 1911 (issued on or about August 1, 1911), and by continuing to advertise the bank as a prosperous and going concern up to the time of its close, dishonestly induced certain persons to deposit money with the bank. The district magistrate having held an inquiry on January 28, 1913, framed against each of the petitioners a charge with three heads in which he charged them that they did respectively "by means of a false and fraudulent balance-sheet and by false advertisements" falsely and fraudulently induce three named persons to deposit moneys with the Bank of Burma, and he committed them for trial by the Court of Session on these charges. In the magistrate's Court the balance-sheet was attacked on four specific grounds.

On February 17, 1913, the petitioners were put upon their trial at Rangoon before Twomey J. and a jury. The judge struck out that part of the charge which referred to advertisements on the ground that there was no evidence before the magistrate that the persons named had seen them. On the second day of the trial the learned judge of his own motion amended the charges by adding the words "and by intentionally keeping the bank open as a going concern after it had ceased to be solvent." Up to the close of the prosecution no indication was given that the grounds of attack upon the balance-sheet had been enlarged beyond the four grounds alleged before the magistrate, or that the petitioners were being charged with falsely and fraudulently shewing as debts considered to be good debts which they knew were bad or doubtful. Only one debt of this character was specifically referred to by the prosecution and the debtor was thereupon called by the petitioners as a witness. The learned judge in his summing up stated that the fundamental issue in the case was whether the balance-sheet was

false in taking as good assets "a large amount of debts which could not honestly be considered as good debts" and in treating as assets unpaid interest upon those debts. The learned judge specified to the jury debts amounting to about 22 lakhs as to which he directed them to consider whether the petitioners should not have regarded these debts as bad or doubtful. The petition alleged that this was the first time in the course of the trial on which these debts were specified. The petition also complained of the summing up of the learned judge upon other grounds and objected that certain evidence had been admitted improperly.

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On April 11, 1913, the jury returned a general verdict of guilty against each of the petitioners on all the charges. The learned judge passed sentences on the first petitioner of eight months' rigorous imprisonment on each charge and upon each of the other petitioners' sentences of six months' rigorous imprisonment on each charge, the sentences in the case of each of the petitioners to run consecutively.

The petitioners applied to reserve and refer certain questions of law for the decision of the Chief Court of Burma under the Code of Criminal Procedure (Act V. of 1898), s. 434. Their application included several questions, of which, however, the learned judge refused to refer any but four, which included the question whether the amendment of the charge in the course of the trial had prejudiced the petitioners.

On June 20, 1913, arguments upon the questions so reserved were heard together by three judges, including Twomey J., who had presided at the trial, and judgment was delivered deciding all the questions reserved against the petitioners. By this judgment the Court held (*inter alia*) that the question whether the principal debts were good or bad was involved in the charge, and that having regard to passages in the summing up they were unable to hold that the jury had found their verdict upon the ground of the charge added by amendment.

Sir R. Finlay, K.C., and *Coltman*, for the petitioners. The amendment of the charge by the judge during the trial was bad in law, and the verdict was bad as being a general verdict upon a

J. C. charge part of which was bad in law. The learned judge ought
 1913 not to have directed the jury to consider whether a large amount
 CLIFFORD of the debts shewn in the balance-sheet should not have been
 v. treated as bad or doubtful. These debts had not been specified
 THE KING- during the trial, and the petitioners had no notice that this was
 EMPEROR. an allegation which they had to meet. The summing up was
 — unsatisfactory in other respects and evidence was wrongly received.
 The sentences passed were in contravention of the Indian
 Penal Code, 1860, s. 71. Consecutive sentences should not have
 been passed in respect of the separate charges which were really
 part of the same offence.

The Crown did not appear upon the hearing of the petition.

1913 The judgment of their Lordships was delivered by

Nov. 17

VISCOUNT HALDANE L.C. Their Lordships do not propose in
 this case to recommend that leave to appeal be given. Their
 functions are not to sit as a Court of Criminal Appeal, and it
 would be contrary to their constitutional duty to assume that
 position. A Court of Criminal Appeal can go into questions of
 evidence and into questions of procedure, and can deal with the
 case on the same footing as an ordinary Court of Appeal. Their
 Lordships' functions on the other hand are limited by the
 principle laid down in *Dillet's Case* (1) to something much more
 narrow, namely, this: that if they find that what has been done
 has been grossly contrary to the forms of justice, or violates
 fundamental principles, then they have power to interfere. But
 in the present case they think there was evidence to go to the
 jury on all the matters which have been dealt with, and it would
 be contrary to their duty to express any opinion as to whether in
 that state of things the verdict found by the jury was a right one,
 or the summing up a perfect one. As regards the sentences, it
 is obvious that the question is one of form only. The learned
 judge has given three periods of eight months in one case and
 three periods of six months in another, taking each offence as a
 separate offence. Technically, their Lordships think that these
 were separate offences, and moreover it would have been possible
 to give a longer term upon any one or the whole of the charges

(1) 12 App. Cas. 459.

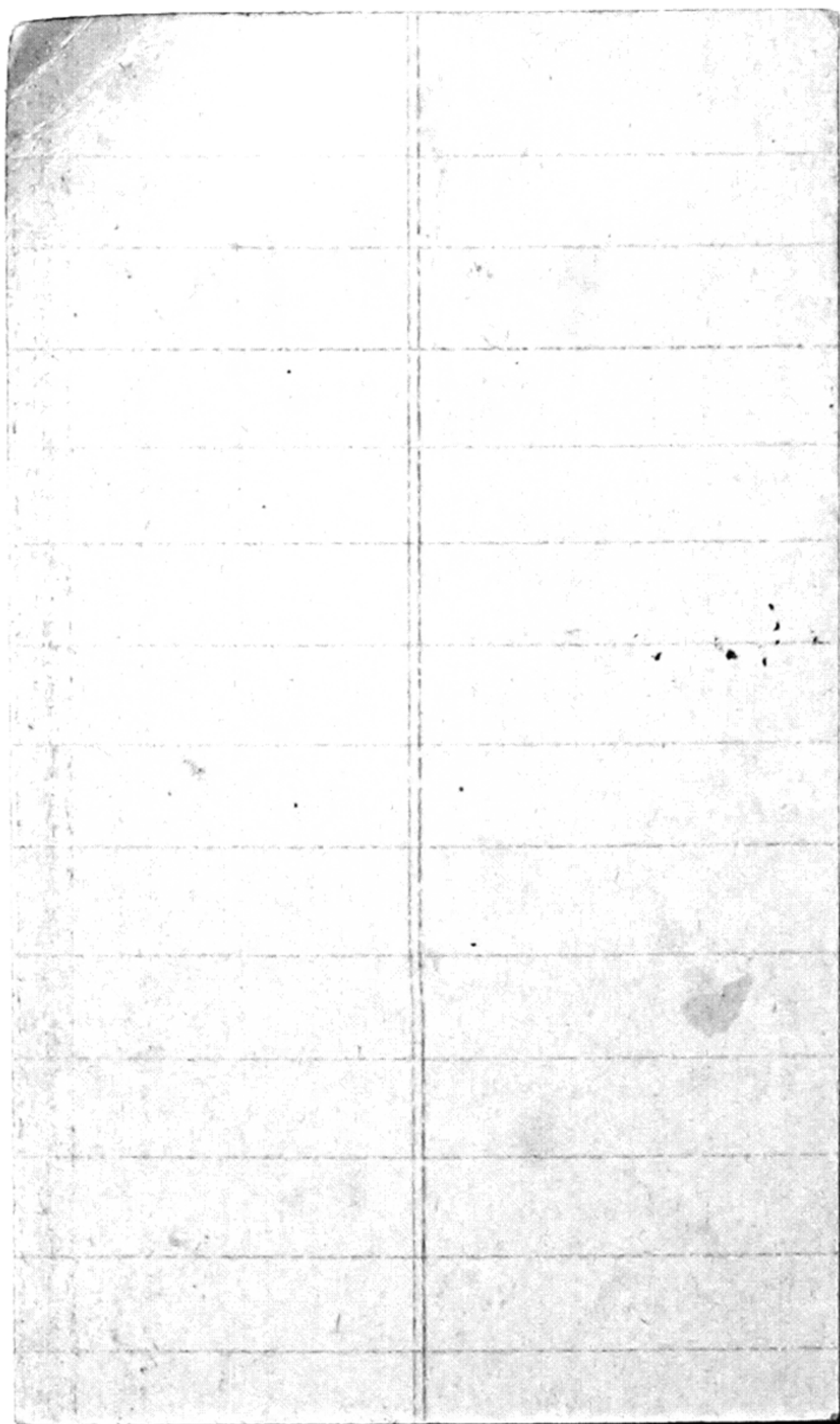
in question. The analogy between this case and the other cases which constantly occur in criminal jurisprudence is a perfect one, and their Lordships see no difficulty in treating these as separate offences. Their Lordships will humbly advise His Majesty that the petition ought to be dismissed.

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Solicitors for petitioners : *Arnould & Son.*

END OF VOL.



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<p>The six months within which the Collector may move under the Court Fees Amendment Act, s. 19H, to obtain an amended valuation of an estate in respect of which letters of administration have been granted runs from the date of the exhibition of an inventory to satisfy the Probate and Administration Act, 1881, s. 98, and not from the date when the District Judge holds that a sufficient inventory has been exhibited.</p> <p>Documents filed in another suit cannot be taken in conjunction with lists exhibited by an administratrix for the purpose of constituting a sufficient inventory.</p>	
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<p>The Transfer of Property Act, 1900, s. 130, sub-s. 1, which provides that the transfer of an actionable claim shall be effected only by an instrument in writing, applies not only to absolute assignments, but also to assignments by way of charge, and the deposit without writing of any document of title to such a claim does not create any equitable charge.</p> <p>The analogies of English law cannot be applied to contradict the positive terms of an Act.</p>	
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BENGAL LAND REVENUE SALES ACT, 1868 (BENGAL ACT VII. OF 1868), s. 2—*Order of Commissioner—“Final”—Review of Order.*

The Bengal Land Revenue Sales Act, 1868, by s. 2 provides that the order of the Commissioner, upon an appeal to him under that Act, shall be “final.” A Commissioner, upon such an appeal, made an order annulling the sale in question. Afterwards, being of opinion that this order was wrong in law, he reviewed it, and made an order upholding the sale :—

Held, that the Commissioner had no power to so review his order.

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COURT OF WARDS—*Central Provinces Government Wards Act (XVII. of 1885), ss. 6 and 18—Joint Hindu Family—Managing Member Ward—Power to mortgage Joint Family Property—Sanction of Chief Commissioner.*

Held, (1.) that under the Central Provinces Government Wards Act (XVII. of 1885), s. 6, since repealed by Act XXIV. of 1899, the Court of Wards, upon the application of the managing member of a joint Hindu family, could assume the superintendence of the joint family property.

(2.) That it was not necessary under s. 18 of Act XVII. of 1885 that the actual mortgage proposed to be made by the Court of Wards should be submitted to the Chief Commissioner or his previous sanction obtained to its precise terms.

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CRIMINAL PROCEEDINGS—*Grounds for setting aside Conviction—Substantial and grave Injustice—Misreception of Evidence—Absence of reliable Evidence.*

Conviction of abetment of murder and sentence of death set aside on the ground that substantial and grave injustice had been done, mainly by the admission of evidence which was inadmissible, and from the fact that at the end of the hearing before the judge of first instance there did not exist any reliable evidence upon which a capital conviction could safely and justly be based.

In re Dillet (1887) 12 App. Cas. 459, applied.

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EVIDENCE—*Indian Evidence Act, s. 92—Usufructuary Mortgage—Construction—Express Agreement cannot be varied by Preliminary Negotiations.*

Where there is an express and unambiguous stipulation in a mortgage deed that the profits of the mortgaged property shall

belong to the mortgagee in lieu of interest it cannot be varied or contradicted by reference to preliminary negotiations. Under the Indian Evidence Act effect must be given to it and the mortgage cannot be treated as usufructuary only in form.

Held, also, that a written but unregistered agreement made after the mortgagor had given up possession under a lease by the mortgagee as to the mode in which the rents and profits should be dealt with was inadmissible in evidence under Act III. of 1877.

SAIYID ABDULLAH KHAN *v.* SAIYID BASHARAT HUSAIN .. 31

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GOVERNMENT OF INDIA ACT, 1858 (IMPERIAL), s. 65—*Burma Act IV. of 1898, s. 41 (b), ultra vires—Remedy of the Subject against the Government in respect of Land.*

Sect. 41 (b) of Act IV. of 1898 (Burma), which enacts that no Civil Court is to have jurisdiction to determine a claim to any right over land as against the Government, is *ultra vires*, as being in contravention of s. 65 of the Government of India Act, 1858. That section provides that there is to be the same remedy for the subject against the Government as there would have been against the East India Company, and it cannot be repealed by an Indian Legislature:—

Held, that a suit for damages for wrongful interference with the plaintiff's property in land would have lain against the East India Company.

Peninsular and Oriental S. N. Co. v. Secretary of State for India (1861) 5 Bomb. H. C. R., appendix, approved.

SECRETARY OF STATE *v.* MOMENT 48

HINDU JOINT FAMILY—*Partition by Father—Suit by Sons to recover Property—Form of Suit—Adoption—Limitation of Claim by Sons unborn at Date of Alienation—Limitation Act (XV. of 1877), s. 7 and Sched. II., art. 126.*

The appellants, four brothers and members of a Hindu joint family, in December, 1907, commenced a suit against the respondents, alleging that their father (who was joined as a defendant) had made an improper alienation of part of the joint family property to the first respondent by partition in 1898, and claimed as relief that the defendants might be ordered to deliver to them possession of whatever part of the property was in their possession. It was admitted by the appellants that the first respondent had been in joint possession of the property with their father since 1887 and in separate possession of the share allotted to him by their father since 1898. The eldest appellant was born in 1886 and attained his majority within three years of the commencement of the suit; the three younger appellants were not born until after 1887, when the first respondent's joint possession of the property commenced. The suit had been tried upon the pleadings and admissions, and dismissed.—

Held, (1.) that the appellants were entitled to bring the suit in the form in which it was presented and without praying for a partition of the property; (2.) that the suit be remanded for trial on the evidence with a declaration that it was competent for the Court at the trial to make the whole or part of the relief granted to the appellants conditional upon their assenting to a partition of their father's share so as to give effect to any right which the first respondent might be entitled to claim through him, but

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without expressing any opinion whether or not any such right existed in law or in fact; (3.) that if the eldest appellant succeeded in the suit his younger brothers would be entitled to share in the relief granted.

RAMKISHORE KEDARNATH *v.* JAINARAYAN RAMRACHHPAL .. 213

HINDU JOINT FAMILY—Managing member ward—Power to mortgage: *See* COURT OF WARDS 117
 —————*See* PARTITION. 1 and 2 40, 161

HINDU WILL—*Vesting of an Absolute Estate—Gift over invalid.*

An unqualified gift will not be cut down by subsequent words unless they clearly have that effect.

Application of this principle to the gift of a seabaitship and debottar estate by a Hindu will.

TRIPURARI PAL *v.* JAGAT TARINI DASI 37

INDIAN CONTRACT ACT (IX. of 1872), SS. 15 AND 72—*Wrongful Attachment of Property—“Coercion”—Suit to recover Money paid—Voluntary Payment.*

The plaintiff in a suit alleged by his plaint that he was the sole proprietor of certain cotton mills and their contents; that the defendants, who had a money decree against a limited company, obtained thereunder an attachment against his said property for Rs. 83,005, took possession, and prevented him from working the mills; that he was, in consequence, compelled to pay to the defendants, under protest, the above sum, which he claimed to recover in the suit:—

Held, that the word “coercion” in s. 72 of the Indian Contract Act is used in its general and ordinary sense, its meaning not being controlled by the definition of “coercion” in s. 15 of that Act, and that the facts alleged by the plaint constituted a good cause of action.

SETH KANHAYA LAL *v.* NATIONAL BANK OF INDIA 56

INVENTORY: *See* ADMINISTRATION 236

INSURANCE (FIRE)—*Damage done by Water—Damage increased during Possession by the Insurers—Liability of Insurers.*

An insurance company taking and holding under a provision in its policy possession of premises damaged by fire does so in its own interest in order to minimize its loss, and cannot be allowed to say that the actual damage shewn at the date of giving up possession to the owner is not the consequence of the fire. Damage done by the water employed to extinguish the fire being within the loss insured, any increase to that damage while the property is under the care of the insurers must be borne by them.

AHMEDBHOY HABIBBHOY *v.* BOMBAY FIRE AND MARINE INSURANCE COMPANY 10

“JUSTICE, EQUITY AND GOOD CONSCIENCE”: *See* WILL 105

LITIGATION—*Agreement to finance—Construction—No present Interest in Property—No Right to sue—Defect on Face of Party's Title—Practice—Point not raised in Court appealed from.*

The respondent entered into agreements with the proposed plaintiffs in two intended suits to recover possession of certain shares in five villages. The agreements provided (1.) that the respondent would be a co-sharer with the respective plaintiffs; (2.) that he would finance the litigation; (3.) that, in the event

of success, he would be entitled to proprietary possession of the share stipulated for. The suits were accordingly commenced, the respondent being joined as a plaintiff. In each suit the plaintiffs other than the respondent entered into a compromise whereby their claim was dismissed, and the respondent continued the litigation alone. The question of the competence of the respondent to join in or to continue the suit, though raised in the earlier stages of the litigation, was not relied on or discussed in the Court appealed from; it was, however, specifically raised in the appellant's case upon the appeals to His Majesty in Council:—

Held, that the agreements conferred on the respondent no then present right in the property in suit and that he was consequently not competent to join in bringing or to continue the litigation.

Held, also, that, this being a defect upon the face of the documents upon which the respondent's case as plaintiff rested, the appeals should be allowed although the point had not been fully raised in the Court appealed from.

BASANT SINGH *v.* MAHABIR PERSHAD 86

MINING LEASE—*Parcels—Area stated within specified Boundaries—Alleged Deficiency—Abatement of Rent.*

The appellant was lessor and the respondents lessees under a mining lease, the terms of which were contained in a kabuliyat, granting the rights of cutting, raising, and selling coal beneath "400 bighas of land, described in the schedule below, in mauza Dobari"; the schedule specified boundaries and added "right in the coal underneath the 400 bighas of land within these boundaries." In a suit to recover arrears of rent the respondents alleged that they were in possession of less than 400 bighas and claimed to be entitled to an abatement:—

Held, (1) that the construction of the kabuliyat as to the land included in the lease could not be varied by evidence of the negotiations which led to the contract or by evidence that there were not 400 bighas within the specified boundaries; (2.) further that the respondents had failed to prove what was the area in fact contained within the boundaries or that of which they had been given possession.

DURGA PRASAD SINGH *v.* RAJENDRA NARAYAN BAGCHI .. . 223

I. MINOR—*Guardian ad litem—Father and Managing Member Guardian—Compromise—Leave of the Court—Code of Civil Procedure, 1882, s. 462.*

When the father of a minor, a member of a joint Hindu family, of which the father is the managing member, is appointed his guardian ad litem, his powers as managing member, so far as they relate to the minor's interest, are controlled by the Code of Civil Procedure, 1882, s. 462, and he cannot, without the leave of the Court, enter into any agreement or compromise on behalf of the minor with reference to the suit.

GANESHA ROW *v.* TULJARAM ROW 132

2. — *Compromise of Proceedings—Absence of Consent—Decrees made without Knowledge of Facts—Setting aside Dismissal of Suit—Limitation Act (XV. of 1877), s. 7 and Sched. II., art. 10—Specific Relief Act (I. of 1877), s. 42—Code of Civil Procedure (XIV. of 1882), ss. 443, 462.*

The appellants when minors had been defendants in a pre-emption suit in which the respondent (their guardian de facto) was plaintiff, and a second pre-emption suit as to the same property had been instituted in their names by the respondent, he

and others being defendants. No guardian ad litem was appointed. Under a compromise agreement, to which the sanction of the Court had not been obtained, a decree was made in the first suit in favour of the respondent and the appellants' suit was dismissed. The appellants brought the present suit for a declaration that the compromise and decrees were not binding upon them. When the suit was commenced the time had elapsed within which they could, under the Limitation Act, 1877, s. 7 and Sched. II., art. 10, have commenced pre-emption proceedings:—

Held, that a declaration as prayed should be made.

Held, also, that the suit was not one brought under the Specific Relief Act, 1877, s. 42, under which the passing of a decree is discretionary.

PARTAB SINGH v. BHABUTI SINGH	182
MINOR—Petition by mother as natural guardian : <i>See</i> PRACTICE. 1 ..	140

1. MORTGAGE—*Redemption—Limitation Act, 1877 (Act XV. of 1877), s. 19—Acknowledgment—Receipt in Collector's Book—Damdupat—Civil Procedure Code, 1882 (Act of 1882), s. 209—Discretion to allow Interest.*

In 1793 a desai mortgaged with possession certain desaigiri dastur and pasaeta lands. In 1843 the persons in whom the mortgage rights were then vested received the desaigiri dastur from the Government. The payment was entered in the Collector's book, the recipients, through whom the appellants claimed, being described as the mortgagees of the desai. To this entry the recipients signed a receipt:—

Held, that this receipt was an acknowledgment.

Held, also, that the District Judge in disallowing interest after suit upon the principle of damdupat must be taken to have exercised his discretion under s. 209 of the Civil Procedure Code, 1882.

MAJMUDAR HIRALAL ICHHALAL v. DESAI NARSILAL CHATURBHUJDAS	68
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2. ————— *Redemption — Limitation — Acknowledgment by Widow and Daughter of Mortgagee—Junction of Mortgagor and Mortgagee Interests—Effect of Acknowledgment—Limitation Act, 1859 (XIV of 1859), s. 1, cl. 15—Limitation Act, 1877 (XV of 1877), ss. 2, 19, and Sched. II., art. 148—General Clauses Act (I. of 1868), s. 6.*

The appellant in 1907 instituted a suit for the redemption of a usufructuary mortgage made in 1842. In 1866 and 1867 the widow and daughter respectively of the mortgagee executed deeds of sale of the mortgagee interest which acknowledged the existence of the mortgage. For the period between 1883 and 1898 there was under these deeds of sale a junction of the mortgagor and mortgagee interests in one person. The defendants to the suit were the sons of the mortgagee's daughter above referred to:—

Held, (1.) that the deeds of 1866 and 1867 were neither of them effectual acknowledgments within the Limitation Act, 1877, s. 19, since they were not made by a person "through whom" the defendants claimed title;

(2.) that the statutory time continued to run during the period between 1883 and 1898;

(3.) that although the deeds of 1866 and 1867 would have been effectual acknowledgments within the Limitation Act, 1859, s. 1, clause 15, no title was thereby conferred, and the application of

the Limitation Act, 1877, was not prevented by s. 2 of that Act or by the General Clauses Act, 1868, s. 6.

LALA SONI RAM *v.* KANHAIYA LAL 74

ODDH ESTATES ACT (I. OF 1869, U. P.), ss. 3, 10, 22—*Consent to Settlement before October 10, 1859—Patta and Kabuliat signed later—Settlement in 1859 as Malguzar—Name entered in Lists I. and II.—Property subsequently purchased.*

The holder before the Mutiny of an impartible taluq in Oudh having after the annexation petitioned for a settlement of his former property, the Chief Commissioner by a letter dated October 5, 1859, consented to half the taluq being settled with him. The patta and kabuliat were not executed till October 13, 1859. The settlement was made with him as malguzar, and no sanad was issued. At the regular settlement in 1865-6 six further villages were settled with him. His name was entered in Lists I. and II. under s. 8 of Act I. of 1869 as a taluqdar whose estate ordinarily devolved on a single heir. Subsequently he purchased other villages, some of which had formed part of the original taluq :—

Held, that the villages settled in 1859 and in 1865-6 constituted a taluqdari estate within s. 3 of Act I. of 1869, the descent to which was regulated by s. 22 of that Act, but that the villages subsequently purchased were partible as property of the joint Hindu family.

JANKI PERSHAD SINGH *v.* DWARKA PERSHAD SINGH .. 170

PARCELS: *See* MINING LEASE.

1. PARTITION—*Hindu Joint Family Estate—Intention to separate must be clearly expressed—Separation from Commensality and Joint Worship.*

Separation from commensality and joint worship does not necessarily effect a division of a joint undivided Hindu estate. An intention by one member of a joint family to separate himself and to enjoy his share in severalty will have that effect only if it is unequivocal and clearly expressed; and it must depend upon the facts of each case whether partition is effected thereby.

Where separation from commensality and joint worship between two brothers was shewn to have arisen from a difference in their religious opinions, and there was evidence of conduct inconsistent with partition of title or with exclusion from joint enjoyment :—

Held, that a severance was not proved.

PANDIT SURAJ NARAIN *v.* PANDIT IKBAL NARAIN .. 4C

2. ————*Hindu Joint Family—Family Arrangement—"Will"—Record of Arrangement—Reservation of Right to Cancel—Mutation of Names—Evidence of Consent.*

The head of a joint Hindu family, being old and infirm, in September, 1895, divided substantially the whole of the joint family property between his three sons and his wife, putting them into possession and retaining no share for himself. In November, 1895, he executed a document, called therein a will, in which he stated that he had made this division, naming the villages. The document ended with this clause: "If I at any time come back from pilgrimages and find mismanagement or character of any one bad, then I shall have power to cancel this will which shall be enforced from the date of its execution." Mutation of names in accordance with this division took place with the

consent of all parties, and suits for rent were brought by the sons in their own names severally. In 1905 a partition suit was commenced by the younger sons :—

Held, that there was overwhelming evidence that the plaintiffs consented to the family arrangement as a partition, that the above clause of the document of November, 1895, if it had any operative effect, was insufficient to outweigh that evidence, and that the suit should be dismissed.

BRIJRAJ SINGH <i>v.</i> SHEODAN SINGH	161
PARTITION BY FATHER: <i>See</i> HINDU JOINT FAMILY	213

PLEDGE—*Indian Contract Act*, 1872, s. 178—*Pledgee of Goods without Notice of Plaintiff's Title—Delivery to the Order of Depositor not a Conversion.*

Whatever may be the true construction of s. 178 of the Indian Contract Act, 1872, it is a complete defence to a suit for the delivery of the plaintiff's goods if the defendant bank has in good faith returned them to the order of the person by whom they were deposited without notice of the plaintiff's title. The bank is not bound to suspect dishonesty in a pledgor of good credit and reputation merely because being a mugaddam as well as a merchant he had an opportunity of acting dishonestly.

BANK OF BOMBAY <i>v.</i> NANDLAL THACKERSEYDASS	1
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1. PRACTICE—*Attachment—Death of Judgment Debtor—Minor Son unrepresented—Irregular Sale—Petition by Mother as Natural Guardian—Competency of Appeal—Code of Civil Procedure*, 1882, ss. 2, 311, 588 (16), 594, and 595.

In execution of a decree against the appellant's father, the appellant (a minor and others, the respondent obtained an attachment against an impartible zamindari the property of the appellant's father. Before the sale the appellant's father died and the zamindari descended to the appellant, who was not represented by any guardian in the attachment proceedings. The respondent purchased at the auction sale. There were irregularities in publishing and conducting sale whereby the appellant suffered substantial injury. Upon the petition of the appellant's mother on his behalf the Deputy Commissioner made an order setting aside the sale. The High Court reversed this order on the facts and confirmed the sale :—

Held, (1.) that under the Code of Civil Procedure, 1882, s. 595, an appeal lay to His Majesty in Council.

(2.) That under the circumstances the appellant's mother, as his natural guardian, was entitled to petition on his behalf to set aside the sale, and that the order of the Deputy Commissioner was right on the facts.

TEKAIT KRISHNA PRASAD SINGH <i>v.</i> MOTI CHAND	140
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2.————*Death of Sole Plaintiff before Trial—Dismissal of Suit for Non-appearance—Jurisdiction to set aside Dismissal—Making Legal Representative Plaintiff—Limitation—Code of Civil Procedure*, 1908, Order IX., rr. 8 and 9; Order XXII., r. 3—*Limitation Act*, 1908, Sched. I., arts. 163 and 176.

When a sole plaintiff dies before the hearing of the suit and the suit is dismissed for non-appearance there is inherent jurisdiction in the Court to set aside the dismissal, and this is expressly preserved by the Code of Civil Procedure, 1908, s. 151. Order IX., rr. 8 and 9, do not apply in these circumstances, and the legal representative can apply under Order XXII., r. 3, to be made a

party within six months of the death under the Limitation Act, 1908, Sched. I., art. 176.

RAJA DEBI BAKHSH SINGH *v.* HABIB SHAH 151

3. PRACTICE—*Criminal Proceedings—Special Leave to Appeal—Limit of Jurisdiction.*

Leave to appeal from convictions and sentences on the grounds of alleged irregular conduct of the proceedings, misdirection of the jury, and misreception of evidence refused, the case not coming within the rules as laid down in *In re Dillet* (1887) 12 App. Cas. 459.

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—————Point not raised in Court below. *See* LITIGATION .. 86

PUNJAB LAND REVENUE ACT, 1887, s. 44—*Effect of Entry in a Record of Rights—Land proved to be Waqf or Graveyard.*

Punjab Land Revenue Act, 1887 (Act XVII. of 1887), s. 44, enacts that “an entry made in a record of rights in accordance with the law for the time being in force . . . shall be presumed to be true until the contrary is proved or a new entry is lawfully substituted therefor.”

In a suit to restrain the appellant from selling as his private property certain land of which he was the nominal owner an entry in a record was to the effect that an area of which the land in suit formed part was graveyard which had been set apart for the Mussulman community, and that by user if not by dedication the whole area was waqf :—

Held, that the appellant’s claim to deal with vacant portions of that area as his private property was not admissible.

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SEBAITSHIP—*Succession—Absence of Evidence of Custom—Ordinary Hindu Law—Plaintiffs not competent to perform Rites.*

In a suit in which the appellants claimed the sebaits of a temple of the Ballavacharya Gosains, of which the first respondent was in possession as sebaits :—

Held, that the rule laid down in *Gossamee Sree Greedhareeje v. Rumanlolljee Gossamee* (1889) L. R. 16 Ind. Ap. 137, that “when the worship of a thakoor has been founded, the sebaits is held to be vested in the heirs of the founder, in default of evidence that he has disposed of it otherwise or of there being some evidence of usage, course of dealing, or some circumstances to shew a different mode of devolution,” cannot be applied so as to vest the sebaits in persons who, according to the usages of the worship, cannot perform the rites of the office.

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WILL—*Will made before 1866—Construction—“Justice, equity and good conscience”—Practice—Suits for Ejectment—Conditional Order for Possession.*

By a will made in October, 1864, a testator, whose will was under *Barlow v. Orde* (1870) L. R. 3 P. C. 164, to be construed according to “justice, equity and good conscience,” provided, among other dispositions, “. . . (4.) that my private zamindari may, at my demise, descend to my eldest son and to his lawful male children ; (5.) in the event of my eldest son dying without lawful male children the above mentioned private zamindari shall descend to my next male heir, and should all my sons die without lawful male children, . . . to my female children, or, in the event of their death, to the female children born in wedlock of my sons in succession.” The testator died in November, 1864, leaving three sons and four daughters. The eldest son, who was fourteen years of age in 1864, died in 1900 without leaving lawful male children :—

Held, that the eldest son took only a life interest under the will.

Suits of ejectment were brought by the appellant claiming possession of villages and mesne profits. Upon appealing to the Judicial Committee the appellant asked for a decree for possession

conditional upon his discharging incumbrances effectual in favour of the respondents against his right to possession :—

Held that, under the special circumstances of the litigation, the suits should be remitted to the High Court upon the footing that upon the incumbrances being discharged within such time as the High Court should think reasonable, a decree for possession should be made, and that in default of payment the suits should be dismissed.

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